Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

JOHN F. KILGROE,

Petitioner,

v.

PACIFIC MARITIME ASSOCIATION; INTERNATIONAL LONGSHORE AND WAREHOUSE UNION AND LOCAL 13, OF THE INTERNATIONAL LONGSHORE AND WAREHOUSE UNION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

QUESTIONS PRESENTED FOR REVIEW

(1) Did the court of appeals have jurisdiction to either recuse itself or to make a good faith attempt to apply the law of the jurisdiction to the record before the court? In the alternative what is plaintiff's remedy when the court of appeal ignores evidence in the record, ignores "controlling authority" or commits other plain error readily correctable on petition for rehearing, yet not corrected?

(2) Is Plaintiff's claim for tortious discharge in violation of public policy preempted by the NLRA?

(3) May plaintiff maintain a claim for violation of the Americans with disabilities act based on defendant's admissions, ignored by the Court of Appeal?

(4) Was it an unacceptable exercise of appellant jurisdiction for the court of appeals to proceed, after finding reversible error, to the breach of contract issues in the first motion for summary judgment without first considering Plaintiff's motion to compel discovery, his remaining discovery time and his right to compel arbitration?

(5) Are defendants' breaching the collective bargaining agreement or the union' duty of fair representation by maintaining policies that treat non union members of the work unit in an arbitrary, discriminatory or in a bad faith manor and did the Union breach its duty of fair representation by refusing to turn Plaintiff's grievances over to the arbitrator?

(6) Did plaintiff raise an issue of fact as to whether he was discharged in violation of the collective bargaining agreement then enforce between the employer and the Union and did the union arbitrarily discriminatorily or in bad faith refuse to consider taking his termination to the second stage in the grievance process where live testimony could be heard and recorded ?

(7) Did J. Lew err in denying without a hearing Plaintiff's motion to disqualify J. Keller?

THE PARTIES

The parties are Plaintiff, Appellant and Petitioner John F. Kilgroe, Defendants/Appellees and Respondents, the Pacific Maritime Association, ("PMA" or "the employer"), the International Longshore and Warehouse Union("ILWU") and Local 13 of the ILWU ("Local 13") (collectively the Union").

TOPICAL INDEX

Page

QUESTIONS PRESENTED FOR REVIEW i

THE PARTIES ii

TABLE OF AUTHORITIES vii

INDEX OF APPENDICES xi

MEMORANDUM AND ORDERS BELOW 1

JURISDICTION IN THIS COURT 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 3

(1) Did the court of appeals have jurisdiction to either recuse itself or to make a good faith attempt to apply the law of the jurisdiction to the record before the court? In the alternative what is plaintiff's remedy when the court of appeal ignores evidence in the record, ignores "controlling authority" or commits other plain error readily correctable on petition for rehearing, yet not corrected? 3

(2) Is Plaintiff's claim for tortious discharge in violation of public policy preempted by the NLRA? 5

(3) May plaintiff maintain a claim for violation of the Americans with Disabilities Act based on defendant's admissions? 7

(4) Was it an unacceptable exercise of appellate jurisdiction for the court of appeals to proceed, after finding reversible error, to the breach of contract issues in the first motion for summary judgment without first considering Plaintiff's motion to compel discovery, his remaining discovery time and his right to compel arbitration? 8

(5) Are defendants breaching the collective bargaining agreement or the union' duty of fair representation by maintaining policies that treat non union members of the work unit in an arbitrary, discriminatory or in a bad faith manor and did the Union breach its duty of fair representation by refusing to turn Plaintiff's grievances over to the arbitrator? 12

(A) May defendants maintain a policy of giving jobs of non union members of the work unit to striking members of non longshore unions? 12

(B) May Defendants maintain one seniority system for plaintiff and others hired as casuals and a second more favorable seniority system for those hired as children of deceased union members? 16

(C) Did the union act arbitrarily discriminatorily or in bad faith when it refused to turn plaintiff's grievances over for arbitration? 18

(6) Did plaintiff raise an issue of fact as to whether he was fired in violation of the collective bargaining agreement then in enforce between Defendants and did the Union arbitrarily discriminatorily or in bad faith refuse to consider taking his termination to the second stage in the grievance process where live testimony could be heard and recorded? 19

(A) Did Plaintiff raise an issue of fact as to whether he was terminated with an employer complaint that was untimely under the collective bargaining agreement? 19

(B) Did Plaintiff raise an issue of fact as to whether his termination was not authorized by the contract or that the termination did not draw its essence from the contract but was the result of the committee's own brand of industrial justice? 20

(C) Did plaintiff raise an issue of fact as to whether the accidents he was charged with (sic) ever occurred? 23

(D) Did Plaintiff raise an issue of fact as to whether the union breached its duty of fair representation by not referring his disciplinary matter to the second step in the grievance procedure where live testimony could be heard and recorded? 24

(7) Did J. Lew err in denying without a hearing Plaintiff's motion to disqualify J. Keller? 26

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Adickes v. S.H. Kress &Co.,(1970)
398 U.S. 144, 159, 26 L. Ed. 2d 142,
90 S. Ct. 1598 ..... 4, 8, 19, 20, 23, 24

Air Line Pilots v. O'Neill (1990)
499 U.S. 65 113 L. Ed. 2d 51,
111 S.Ct. 1127.....12, 17, 19

Carr v. Pacific Maritime Ass'n,
904 Fed.2d 1313 (9th Cir. 1990).....10

Celotex Corp. v. Catrett,
477 U.S. 317, 322, 91 L Ed. 2d 265,
106 S. Ct. 2548 ..... 9, 10

City of Moorpark v. Superior Ct.,
18 Cal 4th 1143, 77 Cal. Rptr. 2d 445,
959 P. 2d 752 6

Garrett v. City and County of San Francisco (9th Cir. 1987)
818 F. 2d 1515, 1518 9

Harper v. San Diego Transit Corp. (9th Cir. 1985)
764 F. 2d 663 6

Hawaiian Airlines, Inc. v. Norris (1994)
512 U.S. 246, 129 L. Ed. 2d 203,
114 S. Ct. 2239 6

Hines v. Anchor Motor Freight, Inc,
424 U.S. 554, 47 L. Ed. 2d 231,
96 S. Ct. 1048 .....5, 18, 19, 20, 25, 26

Humphrey v. Moore,
375 U.S. 342, 11 L.Ed.2d 377 .....14, 15

Lingle v. Norge Div. Of Magic Chef, Inc. (1988)
486 U.S. 399, 100 L. Ed 2d 410,
108 S.Ct. 1877 .....4, 5, 6, 7

Liteky v. United States (1994)
510 U.S. 540, 127 L. Ed.2d. 474,
114 S.Ct. 1147.....4, 28, 29

NLRB v. International Longshoremen's Union, Local 13
(9th 1977)
549 F. 2d.1346 17

Pacific Maritime Ass'n v. NLRB (9TH Cir. 1971)
452 F. 2d 8 15

Paige v. Henry J. Kaiser Co. (9th Cir. 1987)
826 F. 2d 857 6

Saridakis v. United Airlines (9th Cir 1999)
166 F. 3d 1272 6

Singleton v. Wulff (1976)
428 U.S. 106, 49 L. Ed. 2d 826,
96 S.Ct. 2868 ..... 3, 10. 11, 20, 22, 23, 24

Steele v. Louisville & Nashville R. Co. (1944)
323 U.S. 192, 89 L. Ed. 173,
65 S. Ct. 187 17

Steelworkers v. Enterprise Corp. (1959)
363 U.S. 593, 597 4 L. Ed. 2d 1424,
80 S.Ct. 371 .....4, 21, 23

Thomas v. UPS,
890 F.2d 909.....26

United Steelwkrs. Of Am. v. Warrior Gulf N. Co. (1960)
363 U. S. 574, 4 L. Ed. 2d 1409,
80 S. Ct. 1347 ..... 10, 11, 19

Vaca v. Sipes (1967)
386 U.S. 171, 17 L.Ed 2d 842,
87 S. Ct. 903.....2, 14, 15, 18, 19, 20, 25, 26

Walker v. City of Birmingham (1967)
388 U.S. 307, 18 L Ed. 2d 1210,
87 S. Ct. 1824 15

Statutes

28 U.S.C. § 1254 (1) 1

28 U.S.C. § 2101 (c), (g) 1

29 U.S.C. § 185 (a) 1

42 U.S.C. s 12101 2

Calif. Govt. Code s 12940 1

Rules

F. R. C. P., Rule 26 11

Supreme Court Rules, Rule 10 (a) 5, 7, 8, 11, 30

Supreme Court Rules, Rule 10 (c) 6, 8, 11, 15, 17, 18, 19, 20, 23, 24, 26, 29, 30

Supreme Court Rules, Rule 13 (1) and (3) 1

Supreme Court Rules, Rule 56(f) 9

INDEX OF APPENDICES

A	Court of Appeals Memorandum , dated February 10, 2000.
B	Court of Appeals Order, May 15, 2000.
C	Court of Appeals Order May 15, 2000.
D	District Court Order C.R. # 28, April 23, 1997
E	Motion to disqualify J. Keller, CR 58, filed June 26, 1997.
F	District court Order, CR 62, filed July 1, 1997.
G	District court Order, CR 63, filed July 8, 1997.
H	District court Order, CR 64, filed July 10, 1997 .
I	District court Order, CR 67, filed July 11 , 1997.
J	District court Order, CR 97, filed October 29, 1997.
K	District court Order, CR 113, filed December 23, 1997.
L	Minutes of The Joint Port Labor Relations Committee, dated 4/30 1996, CR 32,Exhibit 24.
M	Minutes of The Joint Coast Labor Relations Committee, dated 5/17 1996, CR 32, Exhibit 26.
N	Minutes of The Joint Coast Labor Relations Committee, dated 6/3 96, CR 32, Exhibit 28.
O	Employer Complaint Transaction Report, CR 83, Exhibit 215, page 1
P	Employer complaint, CR 83, EXHIBIT 215 page 2
Q	Minutes of The Joint Port Labor Relations Committee Dated November 4, 1996, CR 83, Exhibit 206, pages 2 and 3.
R	EXHIBIT A of Statement of Uncontroverted Facts and Conclusions of Law in Support of Defendants Interna-tional Longshoremen's and Warehousemen's Unions and Local 13, International Longshoremen's and Warehousemen's Union's Motion For Summary Judgment.
S	Contract Sections of the Pacific Coast Longshore Contract Document

MEMORANDUM AND ORDERS BELOW

The memorandum and two orders, all unpublished, from the Court of Appeals for the Ninth Circuit Appendices A, B and C are from 98-55240. Same case below 208 F.3d 221. The trial court orders are all from case 96 4423-WDK.

JURISDICTION IN THIS COURT

The Court of Appeals issued its memorandum, appendix A, ("memorandum"), affirming the dismissal of Plaintiff's complaint on February 10, 2000. A timely Petition for rehearing and rehearing en banc was filed and denied on May 16, 2000, Although Judge Robert E. Jones would recommend a rehearing en banc. (Appendix C). This Petition for Certiorari is being filed within ninety days of May 16, 2000, which is timely 28 U.S.C., § 2101 (c), (g) and Supreme Court Rules, Rule 13 (1) and (3). The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1)

When the petition for rehearing was pending Plaintiff filed an interlocutory Petition for Writ of Mandate to Vacate the Memorandum and Disqualify the Panel for Failure To Make a Good Faith Attempt to Apply The law of The Jurisdiction to the Record Before The Court. On May 15, 2000, the court dismissed this petition finding the court lacked jurisdiction to issue a writ against itself (Appendix B)

STATEMENT OF THE CASE

Plaintiffs exhausted the grievance procedure on either April 30, 1996, May 17, 1996 or June 3, 1996, appendices L, M and N, within two months of filing the original complaint. On June 21, 1996, plaintiff filed his original complaint, CR #1, invoking federal court jurisdiction for breach of a labor

contract, 29 U.S.C. § 185 (a), and for breach of duty of fair representation by a labor Organization, *Vaca v. Sipes* (1967) 386 U.S. 171, 17 L.Ed. 2d 842, 87 S. Ct. 903.

On April 4, 1997, Plaintiff filed a motion to compel discovery with a 37 page Joint statement C.R. # 26 and C.R. 27. On April 23, 1997, the Court issued an order to granting Plaintiff leave to file his first amended complaint adding claims for wrongful termination in violation of the labor contract 29 U.S.C. 185(a) and breach of the union's duty of fair representation, *Vaca*, violation of the American's with Disabilities Act,42 U.S.C. § 12101 and a State claim for Tortious discharge in violation of public Policy, CR 28 and C. R. 29. The order granting leave to amend continued the discovery cut-off date to August 25, 1997. C.R. # 28 (Appendix D)

On June 26, 1997, Plaintiff filed his motion to recuse the trial judge, C.R. 58. (Appendix E) On July 8, 1997, J. Lew denied the motion to recuse. C.R. 63. (Appendix G) On July 11 the Court entered order granting Defendants' first motions for summary judgment, C.R. 64 (Appendix H). On July 1, 1997, and July 11, 1997 the Court denied the motion to compel as moot in light of the granting of the summary judgment, C.R. 62 (Appendix F) and C.R. 67 (Appendix I).

On October 29, 1997, The court granted Defendants' second motion for summary judgment against Plaintiff's claim for violation of the Americans with Disabilities act, his tortious discharge in violation of public policy claim, and part of his breach of duty of fair representation claim, C.R. 97 (Appendix J) . On November 3, 1997, Plaintiff moved for leave to file the second amended complaint adding a violation of California's Fair Employment and Housing Act. Ca. Govt. C. 12940. On December 23, 1997, the court denied the motion to amend and dismissed the remaining issues in the case, C.R. 113 (Appendix K).

REASONS FOR GRANTING THE WRIT

(1) Did the court of appeals have jurisdiction to either recuse itself or to make a good faith attempt to apply the law of the jurisdiction to the record before the court? In the alternative what is plaintiff's remedy when the court of appeal ignores evidence in the record, ignores "controlling authority" or commits other plain error readily correctable on petition for rehearing, yet not corrected?

Plaintiff filed a petition for writ of Mandamus requesting the court of appeals panel to either recuse itself or make a good faith attempt to apply the law of the jurisdiction to the record before the court. The court of appeals did not deny that it was not making a good faith attempt to apply the law of the jurisdiction to the record before it. The petition was dismissed by the Court of Appeals, citing no authority, Appendix B. The Court of Appeals had jurisdiction to make a good faith attempt to apply the law of the jurisdiction to the record before it. That is what an appellant court should do every day. The Court of Appeals had jurisdiction to recuse itself. Further the Court of Appeal had the duty to do one of these two alternatives, but did neither and failed to prepare its memorandum for efficient Supreme Court Review.

Examples of where the Court of Appeals did not make a good faith attempt to apply the law of the jurisdiction to the record before it are shown more fully in sections below and include: (1) The memorandum ignored Plaintiffs the right to compel discovery and his right to compel arbitration, in conflict with the principals of *Singleton v. Wulff*, (1976) 428 U.S. 106, 119, 49 L. Ed. 2d 826, 96 S.Ct. 2868. (2) The memorandum ignored evidence offered by plaintiff/appellant,

in conflict with the principal that the evidence must be interpreted in the light most favorable to the non moving party, *Adickes v. S.H. Kress &Co.*, (1970) 398 U.S. 144, 159, 26 L. Ed. 2d 142, 90 S. Ct. 1598. including: (a) defendants' admissions that raise issue of fact that the employer complaint was late, appendices O, P, Q; (b) defendants' admissions raising an issue of fact that the accidents plaintiff was charged with did not happen, defendant employer provided photocopies of photographs of the undamaged vehicle Plaintiff had driven, showing that it made contact with nothing, and (c) On page 7-8 in handling the ADA Claim the memorandum ignored defendants admissions on appendix Q. (3) In dealing with the preemption issue, the memorandum ignored "controlling authority" *Lingle v. Norge Div. Of Magic Chef, Inc*, (1988) 486 U.S. 399, 100 L. Ed 2d 410, 108 S. Ct. 1877, (4) In dealing with the disqualifying of J. Keller issue, the memorandum cited authority *Liteky v. United States* (1994) 510 U.S. 540, 555-6, 127 L. Ed 2d 474,114 S. Ct. 1147 but made no attempt to apply *Liteky* to the record. (5)The Court of Appeals on its own added "specific intent" to Plaintiff's burden for no apparent reason. (6) The Court of Appeals included material rules of law in an unpublished opinion that the author would not put in a published opinion. For instance, Footnote 3 on page 7 of the memorandum is incorrect in stating the "Section of Agreement violated was left blank did not prejudice Kilgroe." The "Section of Agreement Violated" is the equivalent of the penal code section in a criminal prosecution. Knowing what contract section was allegedly violated is the first step in getting the Committee to adhere to the contract rather than there own personal since of justice. The employee and the tribunal needs to know what section the employee is accused of or the proceeding does not draw its essence from the contract as required by. *Steelworkers v. Enterprise Corp.*(1959) 363 U.S. 593, 597 4 L. Ed. 2d 1424, 80 S. Ct. 371. Also, if the Union does not

know what the employee is accused of, the union did not adequately investigate the matter as required by *Hines v. Anchor Motor Freight, Inc,* 424 U.S. 554, 47 L. Ed. 2d 231, 96 S. Ct. 1048 (b) (7) The Court of Appeals found that the termination authorized under ¶ ¶ 17.82, and 17.84 but Plaintiff was not found to have violated ¶ 17.82, appendix Q and ¶ 17.84 requires assault or multiple records, see ¶ 17.84 in appendix S, and Assault and multiple records which is not supported by the LRC minutes, appendix Q.

If plaintiff's petition for writ of mandate is not a proper remedy for these abuses by the Court of Appeal, then this Court, under its supervisory power, and duty, should provide a proper remedy. For the foregoing reasons the Court of Appeals did not make a good faith attempt to apply the law of the jurisdiction to the record before it. Therefor the appellant panel is disqualified, and was disqualified before it denied the petition for rehearing. This is grounds to be considered in granting a Writ of Certiorari, under Supreme Court Rules Rule 10 (a) (hereinafter all Rules will refer to Supreme Court Rules unless otherwise noted.), because it calls for an exercise of this court's supervisory power.

(2) Is Plaintiff's claim for tortious discharge in violation of public policy preempted by the NLRA?

In its order of October 29, 1997, C.R. # 97. appendix J, page 2 The trial court correctly identified Plaintiff fourth cause of action as tortious discharge in violation of Public policy, but continued to find the claim preempted under (the NLRA).In its memorandum, appendix A, page 8, the court of appeals affirmed.

The memorandum therefore appears to be in conflict with *Lingle v. Norge Div. Of Magic Chef, Inc.,(1988).* 486 U.S. 399, 100 L. ed 2d 410, 108 S.

Ct. 1877, which held that a similar Illinois claim was not preempted and *Hawaiian Airlines, Inc. v. Norris* (1994) 512 U.S. 246, 129 L. Ed. 2d 203, 114 S. Ct. 2239 Holding public Policy and whistler-blower claims were independent of the bargaining agreement and were not preempted by Railway Labor Act.

In *Saridakis v. United Airlines* 166 F. 3d 1272, (9th Cir 1999), at 1278, the Ninth Circuit said:

> "For preemption purposes, the viability of Saridakis's wrongful discharge claims is largely dependent on *City of Moorpark v. Superior Ct.* 18 Cal 4th 1143, 77 Cal. Rptr. 2d 445, 959 P. 2d 752 (Cal. 1998), where the California Supreme Court held that because disability discrimination violates public policy, an employee may bring a separate wrongful discharge claim for such discrimination The Moorpark court further held that such wrongful discharge claims are independent and not preempted by ether the FEHE or California's workers compensation laws. *Id.* We are bound by those holdings. Likewise we have made it clear that wrongful discharge claims based on public policy violations are not preempted by federal labor laws because such claims are derived from sources outside the CBA. See e.g. *Paige v. Henry J. Kaiser Co.* 826 F. 2d. 857, 862 (9th Cir. 1987) *Harper v. San Diego Transit Corp.* 764, F. 2d 663,668 (9th Cir. 1985).

The memorandum has decided an important federal question, preemption of a public policy claim, in conflict with relevant decisions of this court, *Lingle*, *Hawaiian Airlines, Inc. v. Norris*, which are reasons for granting the writ, Rule 10 (c). The memorandum also Decided this issue in a way that conflicts with *City of Moorpark*, a decision of the

California Court of last resort, which is addition grounds to consider granting the writ, Rule 10 (a).

Further the matter appears to call for an exercise of this Court's supervisory power Rule 10 (a). *Lingle* was brought up in Plaintiff's opening brief, pages 53 to 55, in the Petition for rehearing on page 2 and in the petition for writ, pages 11 through 13. Because Plaintiff-appellant was unable to persuade the court of appeals to attempt to address this preemption issue under *Lingle*, or more current authority, Plaintiff is in need of an exercise of this Court's supervisory power. Further the memorandum was not prepared for efficient review by this Court.

(3) May plaintiff maintain a claim for violation of the Americans with Disabilities Act based on defendant's admissions?

The memorandum (Appendix A) pages 7-8 affirmed the trial court stating:

> "Kilgroe must show he was terminated because of his disability. 42 U.S.C. § 12112 (a) However, he argues that he was not terminated because of his disability, but in retaliation for (filing this lawsuit.)"

The ADA claim is based in part on Defendants admissions in the minutes of the Joint Port Labor Relations Committee, Appendix Q which stated in part:

> "The Committee noted the warning label on the medication bottle states, "May cause drowsiness, Avoid hazardous activity and use care when operating a car or dangerous machinery."
>
> "Further Mr. Kilgroe admitted that he was aware of and ignored the warning label on the medications because he thought that the

medication would enhance his driving capabilities.

"The Committee agreed that Mr. Kilgroe violated Section 17.81 and 17.84 of the PCLCD and Section 6 of the Rules and Procedures regarding Identification of casual longshoremen by ignoring the warning labels on the medication and accepting a UTR job while taking the above-noted medication."

Since the warning labels were outside the collective bargaining agreement, and since Section 17.81 and 17.84 of the PCLCD and Section 6 of the Rules and Procedures regarding Identification of casual longshoremen do not authorize terminations, except for assault or multiple records. The trier of fact may infer that Plaintiff was fired because he attempted to deal with his life long disability. By disregarding defendants admissions the court of appeals did not draw the inferences from the underlying facts in the light most favorable to the non moving party, which is in conflict with the rule in *Adickes* at 398 U.S. 158-9. Which is grounds to be considered in granting the writ, Rule 10 (c).

Further the matter appears to call for an exercise of this Court's supervisory power Rule 10 (a). Defendants admissions were brought up in Plaintiff's opening brief, pages 51 to 53, in the Petition for rehearing on page 5 and in the petition for writ of mandate, pages 11 through 13. Because Plaintiff -appellant was unable to persuade the Court of Appeals to attempt to address Defendant's admissions, Plaintiff is in need of an exercise of this Court's supervisory power under Rule 10(a).. Further the memoran-dum was not prepared for efficient review by this Court.

(4) Was it an unacceptable exercise of appellate jurisdiction for the court of appeals to proceed, after finding reversible

error, to the breach of contract issues in the first motion for summary judgment without first considering Plaintiff's motion to compel discovery, his remaining discovery time and his right to compel arbitration?

In its memorandum, page 2, the Court of Appeals found reversible error in the trial courts finding that any of the claims were time barred. However, the memorandum continued to the merits of the first motion for summary judgment saying on page 5 that the "remainder of Kilgroe's allegations against the Union. . . find no evidentiary support in this record." The memorandum overlooked plaintiff's motion to compel discovery, C.R. # 26, 27, which, after sitting on the magistrates desk for three months was mooted by the granting of the summary judgment, C.R. # 62, 64 and C.R. # 67, appendices F, H and I. The memorandum also over looked the fact that Plaintiff's discovery cut-off date was August 25, 1997, C.R. # 28, page 2, appendix D, when the trial court granted the first motion for summary judgment on July 10, 1997, C.R. # 64, appendix H, thus cutting off about two months of Plaintiffs discovery. Note that in the Ninth Circuit it is error to grant summary judgment While pertinent discovery request were outstanding and a pending motion to compel was sufficient to raise Rule 56 (f) consideration, *Garrett v. City and County of San Francisco* 818 F. 2d 1515, 1518-9 (9th Cir. 1987).

The memorandum also overlooked Plaintiff's prayer for the first claim for relief to compel arbitration, see First amended complaint, C.R. # 29, pages 1 through 6 and 14. Defendants admit that plaintiff exhausted the grievance procedure on those 14 items in appendix R

The memorandum appears to be in conflict with *Celotex Corp. v. Catrett* 477 U.S. 317, 322, 91 L Ed. 2d 265, 106 S. Ct. 2548 which held: "In our view, the plan language of Rule 56 (c) mandates the entry of summary judgment, after

adequate time for discovery." Since Plaintiff's motion to compel, with its 37 page joint statement, C.R. # 26 and 27, sat in the magistrate judges court for three months without being ruled on, Plaintiff has not had adequate time for discovery, and the memorandum should have remanded the case to permit plaintiff to complete discovery, prior to affirming on other grounds. Similarly, the memorandum appears to be in conflict with *Singleton* in which this Court held that it was an "unacceptable exercise of appellant jurisdiction" to proceed to the merits when Petitioners had not had an opportunity to obtain discovery and present evidence.

Plaintiff had the right to compel arbitration. In *Carr v. Pacific Maritime Ass'n*, 904 Fed 2d 1313(9th Cir. 1990) approximately 125 casual longshoremen lost similar grievances for not timely requesting arbitration. In *United Steelwkrs. Of Am. v. Warrior Gulf N. Co* (1960) 363 U. S. 574, 584-5, 4 L. Ed. 2d 1409, 80 S. Ct. 1347, at page 363 U.S. 584-5 this court said:

> "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail. . ."

In its memorandum, page 2 the Court of Appeals found: "and because no provision of the collective bargaining agreement clearly indicates that he did not have a right to appeal to the Coast Committee," Therefore under *United Steelwkrs.* And *Carr*, Plaintiff had a right to compel arbitration. At least the memorandum, under *Singleton* should have considered Plaintiff's right to compel arbitration before affirming on other grounds, Therefore the memorandum is in conflict with *United Steelwkrs* and *Singleton*.

Further there are 3000 to 4000 casual longshoremen in the port of Los Angeles/ Long Beach. We need a grievance procedure that works. The grievance procedure did not work for late grievances in *Carr* because plaintiffs did not timely

exhaust. In this case Plaintiff timely exhausted and the memorandum found there was no right to arbitrate, merely because defendants agreed there was no right to arbitrate. Appendices L, M and N. Apparently Defendants only permit late grievances to reach the arbitrator. We, also, need a Circuit Court that is concerned that the grievance procedure works. There is no evidence that anyone has gotten these discriminatory thirty year old practices before the arbitrator in 30 years. We, also, need a Circuit Court that is concerned with Plaintiff's right to obtain discovery. This calls for an exercise of this court's supervisory power, which is grounds to be considered in granting the writ, Rule 10 (a). We also need a Supreme Court that occasionally exercises its supervisory power/duty when a panel of the court of appeal disregards the record and the law so egregiously that one must be suspicious of the panels motives.

For the above reasons the memorandum appears to have decided an Important federal question, Plaintiff's statutory right to discovery F. R. Civ. P., Rule 26, et seq and his right to compel arbitration. in a way that conflicts with relevant decisions of this Court: *Celotex*, *Singleton*, and *United Steelwkrs* which is grounds to be considered in grant writ of Certiorari, Rule 10 (c).

The opening brief, pgs. 19 - 22, brought up the issue of the motion to compel discovery and the cut off issue with the issue of using the mechanic's exception to back door relatives of union members into the Union in preference to casuals. The issue of the right to compel arbitration was brought up on pages page 27 to 29. The petition for rehearing brought up the discover issues on item (7) on page 5 and item (9) on page 10. The petition for writ of mandamus brought up these items were brought up at items 7 (A), (B) and (C) starting at page 28. The petitions for rehearing and for the writ were denied appendices B and C. Therefore concerning this issue the appellate panel did not make a good faith attempt to apply the law to the record and

the panel should therefore have disqualified itself.

(5) **Are defendants breaching the collective bargaining agreement or the union' duty of fair representation by maintaining policies that treat non union members of the work unit in an arbitrary, discriminatory or in a bad faith manor and did the Union breach its duty of fair representation by refusing to turn Plaintiff's grievances over to the arbitrator?**

In affirming the granting of Defendant's first motion for summary judgment, the memorandum reached the breach of contract issue on each of the following issues: see pages 3,4,5, 6 and 7. Therefore this court may reach the issues of do these practices breach the contract and the unions duty of fair representation or are these practices "so far outside the wide range of reasonableness as to be irrational" within the meaning of *Air Lines Pilots v. O'Neill* (1990) 499 U.S. 65 113 L. Ed. 2d 51, 111S Ct. 1127.

(A) May defendants maintain a policy of giving jobs of non union members of the work unit to striking members of non longshore unions?

Carie S. Clements, in her declarations in support of the Employers Motion for summary judgment, C.R. # 35, declared the following facts which are not disputed:

¶ "8. Occasionally 30-day temporary casual cards are issued to non-longshore members of sister Unions who are engaged in a bona fide strike. Work privileges are approved by the Joint Port Labor Relations Committee for a limited

basis only . A temporary casual card allows the person to be dispatched on the same bases as identified casuals . This practice has been in place since approximately 1984 and is authorized by the 1984 Agreement concerning the casual hall between PMA and the (ILWU). A true and correct copy of this 1984 agreement is attached hereto as Exhibit "C." Importantly, hours worked by thirty day card holders are not counted towards registration credits."

¶ "9. Plaintiff complains that this process of issuing 30-day temporary cards discriminates against him in favor of union members in violation of Section 13. However this is not the case. Thirty-day card holders are dispatched in rotation with other identified casuals, including plaintiff. They do not get special treatment. In fact, they are disadvantaged because their hours do not count toward becoming registered as class B longshoremen"

¶ "10 Plaintiff's complaint about the lottery system are similarly misplaced. The lottery process is used to dispatch work to unidentified casuals. Once an unidentified casuals accumulate a certain number of hours through this system (typically 50 hours or less), they are eligible to become identified casuals upon passing certain test. This is the normal method of becoming and identified casual, and the method by which plaintiff became an identified casual. The lottery process was created jointly by PMA and the Union and is designed to ensure that there is no favoritism involved in dispatching work to casuals. It does not violate the contract, but is a jointly negotiated process under the contract."

Plaintiff in his declarations, C.R. # 51, Page 3, declared:

¶ "10. . . "Hours worked by 30-day card holders are counted towards obtaining, not registration but permanent identified casual status. Through this procedure, merely by issuing enough temporary casual cards Defendants can limit entry into the longshore industry to only those Local 13 wishes to recommend for a 30-day casual . Local 13 tends to

recommend those who are related to members of the ILWU. Also the term 30 day card is misleading. These cards are renewed month after month, usually until the JPLRC issues minutes that grant permanent identified casual status to those 30-day card holders with 50 hours or more who pass various test."

¶ "11. 30- day card holders are dispatched in rotation with identified casual longshoremen, including Plaintiff, Clements decl. Para 9. They enjoy the following special treatment:

"A . 30 day card holders are dispatched in rotation with identified casuals when unidentified casuals can not dream of being dispatched, and thus able to accumulate sufficient hours for permanent identified casual status when unidentified are not being dispatched at all, typical of 1996.

"B 30-day card holders never have to have their (drivers license) drawn at random from a clear plastic box prior to being dispatched." . . .

The Pacific Coast longshore Contract Document Sections, which Plaintiff contends are breached by the defendants policy are ¶ 1 and ¶ 13, appendix S.

The policy of giving jobs of casual longshoremen to striking members of non longshore Unions also appears to breach the Unions duty of fair representation, as defined in *Vaca* at 386 U.S. 177 as:

> "Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes the statutory obligation to serve the interest of all members without hostility or discrimination towards any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. *Humphrey v. Moore* 375 U.S 342, 11 l Ed 2d at 377."

The memorandum, page 5, states:

"It is not irrational for a union to agree to

provide temporary work opportunities to people within the community who are without employment, even if those are not covered by the collective bargaining agreement"

The memorandum by adding the phrase " even if those are not covered by the collective bargaining agreement" to the above quote from page 5 eliminates the Unions duty to represent the interest of the designated unit. See above quote from *Humphrey v. Moore.*

Further in *Pacific Maritime Ass'n v. NLRB* 452 F. 2d 8 (9TH Cir. 1971) the Ninth Circuit enforced an NLRB cease and desist order which, since it involved these parties and this contract, is now part of the collective bargaining agreement. That opinion said at 452 F. 2d 11:

" Finally, PMA argues that Local 6 unionist were accorded only "temporal" priority in dispatch. This point has little merit. Whether jobs were allocated to Local 6 unionist before, after, or contemporaneously with Local 54 Casuals is of no consequence. Assignment of Local 6 men deprived the Local 54 casuals of those jobs."

Therefore giving 30- day cards to striking members of non longshore Unions appears to violate the contract, the Unions' statutory duty of fair representation and a cease and desist order, which is now incorporated into the collective bargaining agreement.

The memorandum also appears to be in conflict with *Walker v. City of Birmingham*, (1967) 388 U.S. 307, 18 L Ed. 2d 1210, 87 S. Ct. 1824. where violating a cease and desist order will land one in jail and lack of specific intent is not a defense. And landing in jail indicates that the conduct is irrational.

This conflict with *Walker* and *Vaca* is grounds to be considered in granting a writ, Rule 10 (c).

(B) May Defendants maintain one seniority system for plaintiff and others hired as casuals and a second more favorable seniority system for those hired as children of deceased union members?

Carie S. Clements, the employers declarant, admits in C.R. # 35, Clements declaration, page 4:

> " ¶ 11 The practice of allowing children of deceased longshoremen to apply for Class "B" registration is set forth in the Coastwide Rules Covering Registration and Deregistration– longshoremen/clerks. A true and correct copy of an excerpt of these rules are attached hereto as Exhibit "D" This practice was negotiated by PMA and the Union over 30 years ago and is incorporated into the collective bargaining agreement."

These Coastwide Rules Covering Registration and Deregistration– longshoremen/clerks. "Exhibit D" state:

> "7.1 A child of a deceased registered longshoremen, clerk or foreman who was on the active registration list at the time of death shall be entitled to apply for Class B registration in the same category that the decedent was registered Class B (longshoremen or clerk).

In the employer's answer to the original complaint ¶ 70 they state:

> "70. Answering the allegations of paragraph 64 B, Defendant alleges that depending on various factors such as work load at the port and how frequently a longshoremen makes himself available for dispatch, it could take as many as 10 to 15 years for an unidentified casual to be registered as a class "B"

Therefore, Children of deceased are admittedly hired

as class B longshoremen or marine clerks, and bypass the casual status or third preference, which may last 10 to 15, years.

The memorandum appears to be in conflict with *Air Line Pilots v. O'Neill*. In *NLRB v. International Longshoremen's Union, Local 13*, 549 F. 2d, 1346 (9th 1977) defendants were enjoined from the practice of sponsorship, a practice that allowed live Union longshoremen to sponsor their children to Class B status. Since this injunction was against these parties, and concerning this contract it is now part of the collective bargaining agreement. The present policy allows dead longshoremen to sponsor their children into Class B status, in preference to casual longshore workers . It is irrational within the meaning of *Air Line Pilots v. O'Neill* to allow Dead longshoremen to do what Live longshoremen are enjoined from doing.

The memorandum appears to be in conflict with *Steele v. Louisville& Nashville R. Co.*,(1944) 323 U.S. 192, 89 L. Ed. 173, 65 S. Ct. 187. In *Steele* this court held that race was not relevant to establishing separate seniority systems. It therefore appears that having a dead father who was a Union longshoremen is also not relevant to establishing a separate seniority system. In *Air Line Pilots v. O'Neill* at 499 U.S. 74 this Court said:

> ."The exercise of a granted power to act on behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf. *Steele v. Louisville& Nashville R. Co.*, 323 U.S. 192 (1944)."

Hiring children of deceased at the class B level in preference to casual longshoremen, therefore appears to breach the Unions duty of fair representation. And the memorandum appears to be in conflict with *Air Line Pilots O'Neill* and *Steel*, which is grounds to be considered in granting a writ, Rule 10 (c).

(C) Did the union act arbitrarily discriminatorily or in bad faith when it refused to turn plaintiff's grievances over for arbitration

The contract sections are in Appendix S. Section 13 grievances are appealed to the Court Arbitrator under Paragraph 17.4, et seq.

Pursuant to Contract ¶ 17.43, Plaintiff mailed his request for arbitration, C.R. # 32, Exhibit 27, to the Coast LRC, who without considering the merits refused to turn the request over to the arbitration. C.R. # 32 Exhibit 28, appendix N. The fact that the Union did not consider any grievance at the Coast level, was admitted in their "Statement of Uncontroverted Facts and Conclusions of Law in Support of . . . Union's Motion For Summary Judgment." Lodged on or about April 25, 1997 at page 5, lines 1 to 7. The Unions agreeing with the employer that arbitration should be denied for unstated subjective reasons, appendices L, M and N and was, therefore, arbitrary and a breach of the Unions duty of fair representation. See *Vaca* and *Hines.* Which is grounds to be considered in granting the writ, Rule 10 (c)

The memorandum, on page 2 assumed that the Union could deny Plaintiff's right to arbitrate for no reason at all. See appendices L, M and N and the statement in the memorandum, on page 2:

> " Because Kilgroe was not informed that his appellate remedies in the grievance process were exhausted until April 30, 1996, and because no provision of the collective bargaining agreement clearly indicates that he did not have a right to appeal to the Coast Committee,"

Here the memorandum assumed that Plaintiff could be denied arbitration for no reason at all which is in conflict with

United Steelwkrs, *Vaca* and *Hines*. Further the memorandum assumed a disputed issue, that Plaintiff had no right to appeal in the grievance procedure, in favor of the moving party rather than the non moving party as required by *Adickes*. Since the memorandum is in conflict relevant decisions of this Court, these are additional grounds to be considered in granting the Writ of Certiorari, Rule 10 (c)

(6) Did plaintiff raise an issue of fact as to whether he was fired in violation of the collective bargaining agreement then enforce between Defendants and did the union arbitrarily discriminatorily or in bad faith refuse to consider taking his termination to the second stage in the grievance process where live testimony could be heard and recorded ?

(A) Did Plaintiff raise an issue of fact as to whether he was terminated with an employer complaint that was untimely under the collective bargaining agreement?

Plaintiff offered as evidence the minutes of the Joint Port LRC recording his termination, Appendix Q, C.R. # 83, Exhibit 206, pages 2 and 3, which admitted that "the contract required that the complaint must be filed by the employer within 30-days of the incident. " Plaintiff also offered an employer Business record, an Employer Complaint Transaction Report, Appendix O, C.R. # 83, Exhibit 215, page 1, admitting that the date of incident was September 18,1996, and that the employer received the complaint on October 23, 1996, and notified the Union on the same day. Therefore the employer received the report and notified the Union on the 35th day after the date of incident, or five days past the 30-

day dead line. This raised a genuine issue of material fact of whether the employer complaint was untimely.

The trial court did not reach this issue, appendices J and K The memorandum on page 7 states:

> "The action was not untimely, because ¶ 17.811 of the contract only requires the employer to provide a copy of the complaint within thirty days if the action is brought against a Union member."

This was not even contended by appellees, see their appellees' brief page 38-40. The memorandum's statement is not supported by the record, including ¶ 17.811, see appendix S, and ignores the admission on appendix Q. that the employer must file in 30 days. Under *Adickes* the memorandum should have interpreted Defendants material, including its contract in the light most favorable to Plaintiff the non moving party, which the memorandum did not do.

Further, the memorandum assumes that the union need not be notified. If the union was not notified of the date, time, location on name of the employee involved, the union would not be able to carry out its statutory duty of fair representation, including its duty to investigate, required by *Vaca* and *Hines*.

Therefore it would have been irrational under *Air Line Pilots v. O'Neill* for the union to negotiate a procedure where it was not timely notified in the case of disciplinary matters against non union members. Further before the memorandum assumed that the complaint was timely I should have been allowed to complete my discovery under *Singleton*.

Therefore, the memorandum appears to be in conflict with *Adickes*, *Singleton*, *Vaca*, *Hines* and *Air Line Pilots v. O'Neill* which is grounds to be considered in granting a writ, Rule 10 (c).

(B) Did Plaintiff raise an issue of fact as to whether his termination was not

authorized by the contract or that the termination did not draw its essence from the contract but was the result of the committee's own brand of industrial justice?

The Joint Port Labor Relations Committee found, appendix Q:

"The Committee agreed that Mr. Kilgroe violated Section 17.81 and 17.84 of the PCLCD and Section 6 of the Rules and Procedures regarding Identification of casual longshoremen by ignoring the warning labels on the medication and accepting a UTR job while taking the above-noted medication."

"The Committee agreed to permanently revoke Mr. Kilgroe's casual dispatch privileges"

In *Steelworkers v. Enterprise Corp*(1959) at 363 U.S. 593, 597, This court said:

> "Nevertheless an arbitrator is confined to interpretation and application of the collective bargaining agreement: he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the Collective bargaining agreement. When the arbitrators words manifest an infidelity to this obligation, the Courts have no choice but to refuse enforcement of the award."

The Committee's action appears to be in violation of *Steelworkers* by not drawing its essence form the collective bargaining agreement and it appears that the committee is dispensing its own brand of industrial justice by including the clause: "by ignoring the warning labels on the medication and accepting a UTR job while taking the above-noted

medication." There is no evidence that the warning label on Plaintiff's medicine bottle was part of the Collective Bargaining agreement or that accepting a UTR job while taking such medication was prohibited by the collective bargaining agreement.

The Court of Appeals properly ignored Section 6 of the Rules and Procedures regarding Identification of casual longshoremen since there was no evidence that it was made known to Plaintiff or the casuals and Section 6 has 23 subsections. Further, under Contract ¶ 17.53 the Committee would have to agree to "specific provisions of the written agreement." since the Joint Port LRC, Appendix Q, did not specify which of the 23 subsections they agreed that Plaintiff violated there is at least an issue of fact that the committee was dispensing their own brand of industrial justice and not drawing from the essence of the Collective bargaining agreement. Therefore the memorandum properly ignored this section.

The Court of Appeals properly ignored ¶ 17.81 , which requires deliberate repeated offences for which the employee has been found guilty under the contract procedures before the employee is cancelled from registration. See appendix S ¶ 17.81.

¶ 17.82 was incorrectly brought up by the Court of Appeals, the Joint Port LRC did not find Plaintiff to be in violation of this section, see Appendix Q. Also, it does not appear appropriate, under *Singleton*, for the Court of Appeal to bring up this new section without remanding it so that Plaintiff may address it. Further ¶ 17.82 has sub-sections for assault, pilferage, drunkenness, use of drugs (first offence 15 day suspension), sale of drugs, violating reasonable verbal, posted safety rules or Sections of the Pacific Coast Marine safety code. (First offense letter of warning) (note there is no evidence that this section includes violating warning labels on medicine bottles), see appendix S. Therefore we can not tell what the Court of Appeal is talking about. Further Under ¶

17.53, The Arbitrator (and therefore the employer presenting the matter to the arbitrator) would have to agree to a specific provision of the written agreement. Therefore it was an unacceptable exorcize of appellate jurisdiction for the court of appeals to bring up on its own ¶ 17.82, in conflict with *Singleton*. Further The memorandum by ignoring the fact that Plaintiff was not found to have violated ¶ 17.82 and ignoring that contract section's subsections is in conflict with the principal that the evidence must be interpreted in the light most favorable to the non moving party, *Adickes*

This leaves ¶ 17.84, see appendix S, which requires either assault or having multiple "records." Since the Joint Port Labor Relations Committee, appendix Q did not mention multiple records or assault, and there is no evidence of (plural) records or assault, ¶ 17.84, is not appropriate.

Therefore there is an issue of fact as to whether Plaintiff's termination was authorized under the contract and whether the decision to termination drew its essence from the contract, which is in conflict with .*Steelworkers v. Enterprise Corp*. which is grounds to be considered in granting the writ, Rule 10 (c)

(C) Did plaintiff raise an issue of fact as to whether the accidents he was charged with (sic) ever occurred?

Plaintiff offered photocopies of photographs of the vehicle he was driving taken after the alleged accidents provided by the employers agents showing that the vehicle was undamaged, C.R. # 91, Exhibit 221, page 1 and 2. Since Plaintiff's vehicle was not damaged, not a scratch without rust, indicating no new damage, then the trier of fact could conclude that the alleged accidents did not occur and that Plaintiff's vehicle did not touch any object other than the wheels rolling over the pavement. The trial judge did not address the breach of contract issues C.R. # 97, C.R. # 113.

At the Court of appeals, Plaintiff brought up this evidence in his opening brief on page 37-8 and in his petition for writ of mandamus, page 19-20. Appellees and the court of appeals did not address the Photocopies of Photographs and, by not assuming that the alleged accidents did not happen, did not draw the inferences in the light most favorable to the non moving party as required by *Adickes*. In the alternative the Court of appeals should have remanded under *Singleton* so that Plaintiff can complete discovery, which is grounds to be considered in granting the writ, Rule 10 (c).

(D) Did Plaintiff raise an issue of fact as to whether the union breached its duty of fair representation by not referring his disciplinary matter to the second step in the grievance procedure where live testimony could be heard and recorded?

Contract Sections are in appendix S.

The grievance appellant procedure for disciplinary matters, ¶ 17.8 et seq, is governed by ¶ 17.85 under which disciplinary matters are referred by the employer or the union, but not the employee, from the Port LRC to the Area LRC and then to the Area arbitrator for final and binding arbitration, ¶ 17.55. An example of how this normally works is shown in the records of Kaufman. Defendants provided the records of Kaufman, C.R. # 87, pages 40 to 44 where at page 41 the minutes of the Port LRC report:

> " The employer (argued) that Kaufman be found guilty of assault and deregistered as a Class "B" Longshoreman in accordance with Section 9.20 of the Coastwise rules Covering Registering and Deregistering of Longshoremen and Clerks."
>
> "The union requested an opportunity to further investigate this incident and obtain witness testimony before stating its position"

"The Committee agreed to refer this complaint to an Area LRC meeting where witness testimony will be heard."

In *Hines* at 424 U. S. 569-70 this Court said:

"In Vaca "we accept(ed) the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion."at 386 U.S. at 191, 17 L. Ed 2d 842, 87 S. Ct. 903 and our ruling that the union had not breached its duty of fair representation in not pressing the employee's case to the last step of the grievance process stemmed from our evaluation of the manner in which the union had handled the grievance in its earlier stages. Although " the Union might well have breached its duty had it ignored (the employee's) complaint or had it processed the grievance in a perfunctory manner"

In the present case Plaintiff was terminated at the earliest stage in the grievance procedure, appendix Q, and the trial court found that the union representatives present at Plaintiff's disciplinary hearing believed that they owed Plaintiff no duty of fair representation, C.R. # 113, page 3, appendix K. The union therefore breached its duty of fair representation by ignoring the issue of whether plaintiff's disciplinary matter should be appealed to the second level in the grievance procedure. The memorandum fails to address the issue of why the Union did not refer the disciplinary matter to the second level of the grievance procedure under the contract ¶ 17.85, see Appendix S.

When the memorandum on page 8 says: " Assuming the union representatives on the Joint Port Committee owed Kilgroe a duty to render a fair and impartial decision in the disciplinary action. . . ." the Court of Appeals abandoned the duty of fair representation standard of *Vaca* and *Hines* owed by the Union and attempted to substitute the irrelevant and hypothetical duty of the representatives. Under *Vaca* and *Hines* the Union owed Plaintiff a duty to at least consider referring the matter to a higher level and that is a job of an

advocate which the Union admits it did not provide.

Further *Thomas v. UPS* 890 F. 2d 909, 921-22 relied upon by the memorandum and, all cases interpreting teamsters contracts are distinguished by the fact that the teamsters have committees that, per contract, issue final and binding arbitration. In this contract we have arbitrators that issue final and binding arbitration, Appendix S, ¶ 17.55, and the committees are pre-arbitration committees hearings.

The memorandum is, therefore, in conflict with *Vaca* and , *Hines* which is grounds to be considered in granting a Writ of Certiorari, rule 10 (c)

(7) Did J. Lew err in denying without a hearing Plaintiff's motion to disqualify J. Keller?

Plaintiff's Motion, C.R. # 58, Appendix D, filed June 26, 1997, was based on his attached declarations and the transcript of June 25, 1997, in this matter that Plaintiff would order, and the court records and files in this action. J. Lew denied the motion without a hearing July 8, 1997, C.R. # 63, stating "Therefore because no reasonable person with knowledge of all the facts would conclude that Judge Keller's impartiality might be questioned, the court denies the motion for recusal."

In his attached declarations Plaintiff declared that he had been diagnosed as suffering from dyslexia and attention deficit disorder, ¶ 1 Kilgroe went on to declare:

> " ¶ 6. At the end of the hearing on June 25, 1997, Judge Keller was discussing with Counsel for the Defendants an appropriate judgment on the hiring hall issues but the termination issues had not been mentioned and were not before the court. At this point judge Keller appeared extremely irritated and stated that the Americans with

Disabilities claims were likely no better that the mess that I had submitted on the hiring hall practices and that from his personal observation of the way I had conducted myself that day I could not possible be suffering from attention deficit disorder. . .

"9 At the start of the hearing on June 25, 199(7), Judge Keller asked Defense Counsel for their analysis of how to proceed. He said that he preferred their analysis not because it was better on the merits but because he preferred analysis from the persons of Defense counsel rather than the person of Plaintiff. During the hearing the court would not allow me to talk except in response to the court's questions and the court continually cut off those responses. Hence I was not able to respond to the Court or defense counsel's position"

Additionally the reporters transcript of June 25,1997, At page 48, L 24 to page 49

"THE COURT: I have to say to you – just a little preview, Mr. Kilgroe.

"If I am correct on your amended complaint, and you're ADA claim is an attention deficit disorder, your conduct during these hearings bely an Attention Deficit Disorder, I'll tell you that. They really do . So that's a little something to tuck into your analytical craw. Because I listen to you with dates and activities, and I think to myself, Attention Deficit Disorder? With a Question mark, about five of them, after that.

At page 16 Line 3:

" You don't work this area every day. They do. And I will look to your studied

analysis, I believe, but quite frankly, offhand. I put more store, from a legal standpoint, with them. . ."

At page 5, L 16:

"THE COURT: In other words, I'm not criticizing you because you are a type A, I've just got to make some findings; okay? My findings regarding you, and my finding regarding me, Type A. So what?

"In other words, he is no shrinking violet. And let me assure anybody who is reading this record, he's absolutely not a shrinking violet. Quite the contrary, he is a massive African violet. Big Flower. Think of yourself as a big flower, Mr. Kilgroe . . ."

At page 60, line 11:

THE COURT ". . . You know, you want to go sleeves up with me, I'll go sleeves up with you."

Further the reporters transcript of June 25, 1997, reflect the fact that J. Keller on the motions for summary judgment attempted to co-fabricate a statute of limitations defense with defendants using defendants story of the facts of what happened at the unrecorded meetings of the Port LRC and ignoring the written rulings of the LRCs (Appendix K, L, M), which ruling was reversed by the court of appeals. Judge Keller did not address any admission of defendants offered by Plaintiff. This gives meaning to what J. Keller meant by relying on what Defendants attorney presented and not on what Plaintiff presented.

In his opening brief, page 57 Kilgroe relied on *Liteky* (1993) quoting 510 U.S. 540 551:

"A favorable or unfavorable predisposition can also deserve to be characterized as "bias" or "prejudice" because , even through it springs from facts adduced or events occurring at trial, is so extreme as to display clear inability

to render fair judgment."

It appears that the Court of Appeals has decided an important federal question in a way that conflicts with *Liteky*, which is grounds for granting the writ, Supreme Court Rule 10 (c). If the Court is going to listen to defense counsel and not to Plaintiff pro se a fair judgment is impossible. Further the Court of appeals has sanctioned a departure from the usual course of Judicial Proceedings by the lower court as to require this court's supervision, which is grounds for a hearing Rule 10 (a). As the result of the memorandum, J. Keller still believes that it is proper to prejudge the ADA cases of those with learning disabilities, when J. Keller has no expertise in diagnosing learning disorders. Further J. Keller still believes that it is proper to announce that he prefers the law from Defense counsel over Plaintiff Pro se. Further J. Keller still believes that it is proper to ignore evidence offered by Plaintiff, in particular, admissions of Defendants. J. Keller just does not address them. Further J. Keller's invitation to go sleeves up with Plaintiff, appears to call for this court's supervision. Also the Court of Appeals citing Liteky and not attempting to apply any rule of law in the case to the paragraphs 6 and 9 of Plaintiff's declaration appears to call for this courts supervision, Rule 10 (a) There are other bad statements in the reporters transcript but I'm running out of space.

This issue was in the opening brief page 57 through 62, the petitioner for rehearing pages 12 through 15 and the Petition for writ of mandate, pages 5 through 11. In its memorandum page 8, the Court of Appeals stated: " We find no error in Judge Lew's denial of Kilgroe's motion to recuse Judge Keller. See Liteky at510 U.S. 540, 555-6 (1994)" the memorandum offered no reason for its ruling and made no attempt to apply *Liteky* or any other authority to the record before the court.

These allegations appear sufficient under *Liteky v. United States* 510 U.S. 540 (1994) at 551 "pervasive bias" to

require more consideration than that in the memorandum, which is grounds to be considered in granting the writ, Rule 10 (a) and (c)

CONCLUSION

For the above reasons the Writ of Certiorari should be granted.

Dated: August 10, 2000

Respectfully submitted,

JOHN F. KILGROE

Petitioner pro se.

APPENDIX A

FILED
Feb. 10, 2000
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN F. KILGROE,	)	
	)	No. 98-55240
Plaintiff-Appellant,	)	D.C. No. CV-96-04423-WDK
	)	
vs.	)	
PACIFIC MARITIME ASSOCIATION; INTERNATIONAL LONGSHOREMAN'S AND WAREHOUSEMAN'S UNION; LOCAL 13, of International Longshore and Warehouse Union,	)	MEMORANDUM[1]
	)	
Defendants-Appellees.	)	

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal from the United Stated District Court
for the Central District of California
William D. Keller, District Judge, Presiding

Argued and Submitted November 5, 1999
Pasadena, California
Before: Browning, Tashima, Circuit Judges, and Jones, District Judge[2]

1. Pre-Termination Claims

A. Duty of Fair Representation

The district court clearly erred in ruling. As a matter of law, that Kilgroe's fair representation claim was barred by the statute of Limitations. Although the six-month limitations period "generally begins to run when an employee knows or should know of the alleged breach of duty of fair representation by a union" Galindo v. Stoody Co. 793 F. 2d 1502,1509 (9th Cir. !986), this period is tolled "While a good Faith attempts are made to resolve that claim through (internal) grievance procedures." *id.* at1510. Because Kilgroe was not informed that his appellate remedies in the grievance in the grievance process were exhausted until April 30, 1996, and because no provision of the Collective bargaining agreement clearly indicates that he did not have a right to appeal to the Coast Committee, there is at least a genuine issue of fact as to whether Kilgroe was making a good faith attempt to resolve the dispute.

Accordingly, the court must turn to the merits of Kilgroe's fair representation claims. As the exclusive representative of all workers in the longshore bargaining unit,

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[2] Honorable Robert E. Jones, United States District Judge for the district of Oregon, sitting by designation.

the union has a statutory duty to fairly represent all employees. See Vaca v. Sipes, 386 U.S. 171, 176 (1967); Williams v. Pacific Maritime Association 617 F. 2d 1321, 130-31 (9th Cir. 1980). However, a court is not to substitute its judgment for that of the union; the duty of fair representation is limited to avoiding conduct that is "arbitrary, discriminatory, or in bad faith" Stevens v. Moore Business Forms, Inc. 18 F. 3d 1443, 1447 (9th Cir. 1994); see also Williams, 617 F. 2d at 1330. A union's actions are arbitrary "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational" Air Line Pilots Ass'n Int'l v. O'Neill 499 U.S. 65, 67 (1991) (citations omitted).

Kilgroe claims that the union breached its duty by negotiating or sanctioning various policies that harm casual workers. However, the provision of different benefits to different classes of longshore workers does not, without more constitute a breach of the duty of fair representation. *See* Williams v. Pacific Maritime Ass'n 617 F. 2d 1321, 1330 (9th Cir. 1980). Accordingly, the majority of the policies Kilgroe complaints of– Such as failure to provide travel pay to casual workers, permitting children of deceased longshoremen to apply for Class B registration, and preventing casuals from being dispatched based on the union's decision to honor a picket line– are easily disposed of. They are not "so far outside the wide range of reasonableness as to be irrational. Air Line Pilots Ass'n, 499 U.S. at 67.

With respect to his allegation that the union has improperly encouraged temporary casual cards to be issued to members of sister locals in the event of strike or unemployment, Kilgroe is correct that defendants fail to adequately address this court's ruling in Pacific Maritime Ass's v. NLRB452 F.2d 8 (9TH Cir. 1971). In that case, we ruled that the union and Pacific Maritime Association ("PMA") violated Section 8 of the NLRB by causing

members of sister unions to be placed into the pool of casual workers, hereby depriving some casuals of jobs. We stated that the defendants, "by jointly operating an exclusive job referral system in a discriminatory manner which encouraged membership" in a union, violated Section *. *Id.* at 10. Kilgroe contends this case is indistinguishable, because, as before, "(a)ssignment of (sister Locals) deprived . . . casuals of those jobs. *Id.* at 11.

However, in the above-cited case, the court's ruling was based in large part on the fact that they acted with specific intent to discriminate on the basis of union membership. For example, the court emphasized that preference had been given to union workers because the union president had instructed that "union men will go out ahead of casual people" *id.* at 10. In light of the union president's discriminatory intent, defendants were in clear violation of Section 8, which prohibits unions or employers from discriminating against workers on the basis of union membership or non-membership. See 29 U.S.C. § § 158 (a), 158 (b). Here the record reveals no evidence that the union adopted this policy with specific intent to discriminate against casuals. Absent such evidence, the inquiry is whether the union acted in a way that is "so far outside a wide range of reasonableness as to be irrational." Air Line Pilots Ass'n 499 U.S. 67. It is not irrational for a union to agree to provide temporary and limited work opportunities to people within the community who are without employment, even if those people are not covered by the collective bargaining agreement.

The remainder of Kilgroe's allegations against the union– it., that it improperly allowed the casual halls to be flooded and approved various policies that deprive casual workers of benefits or work opportunities– find no evidentiary support in this record.

Accordingly, we affirm the grant of summary judgment for the union on Kilgroe's fair representation

claims.

B. Breach of Collective Bargaining Agreement

Kilgroe next contends these same policies constitute a breach of the collective bargaining agreement by PMA. In particular, he contends that the employer has systematically violated Section 13, the anti-discrimination provision. Again, however, the provision of different benefits to different classes of longshore workers does not, without more, violate the anti-discrimination contract. CF. Williams 617 F. 2d at 1330 (9th Cir. 1980). According, the majority of Kilgroe's claims are without merit.

Again, however, Kilgroe correctly points out that defendants have failed to respond to his allegations that PMA has violated Supplement IV by improperly depriving him of reimbursement for his travel from the dispatch hall to the docks in Los Angeles and Long Beach.

Although the contract language is vague, Supplement IV appears to contemplate that casual workers are entitled to travel pay in some instances.

Paragraphs 1 states:

> "Individuals who voluntarily travel or individuals and/or gangs who are ordered to travel the employer within a defined area shall, when they work, be paid for such travel under the provisions set forth herein.

Paragraph 2 indicates that Southern California is a defined area," but provides an exception to this definition:

> "Exception: When casuals work in the Los Angeles/ Long Beach, individuals who voluntarily from Port Hueneme to San Diego or vice versa shall, when they work, be paid travel time and subsistence to Los Angeles/Long Beach only.

By appearing to specify situations in which casuals are *not* provided with travel pay, the language of Supplement IV would seem to contradict Defendants' contention that casuals are never entitled to travel pay. However Kilgroe has failed to submit any evidence or provide any explanation to support his assertion that reimbursement for his travel from the dispatch hall to the docks in the Los Angeles' Long Beach area is covered by Supplement IV. Therefore, based on this record, the district court properly granted summary judgment for defendants on this issue as well.

II. Post-Termination Claims

Kilgroe failed to present a genuine issue of material fact on the question whether PMA breached the Collective Bargaining agreement when it terminated him. The action was not untimely, because ¶ 17.811 of the contract only requires the employer to provide a copy of the complaint within thirty days if the action is brought against a union member. Furthermore, the contract authorizes the sanctions imposed against him. See ¶ ¶ 17.82, 17.84. And none of the alleged procedural flaws at the hearing were prejudicial.[3]

The district court also properly granted PMA 's motion for summary judgment on Kilgroe's Americans with Disabilities Act ("ADA") claim. To recover under the ADA, Kilgroe must show he was terminated because of his disability. 42 U.S. C. ¶ 12112 (a). However he argues that he was not terminated because of his disability, but in retaliation

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[3]For example, the fact that the portion of the complaint entitled "Sections of Agreement Violated" was left blank did not prejudice Kilgroe because there was no factual dispute at the hearing– Kilgroe admitted to the accident and his use of medication.

for the numerous grievances he had filed.

Kilgroe's state-law wrongful termination claim is preempted by federal law because it invokes rights protected by Section 7 and 8 of the National Labor Relations Act.

Assuming the union representatives on the Joint Port Committee owed Kilgroe a duty to render a fair and impartial decision in the disciplinary action, see Thomas v. UPS, Inc. 890 F. 2d 909, 921-22 (7th Cir. 1989), Kilgroe presented no evidence that the representative breached this duty. His allegations that she failed to advocate on his behalf, failed to refer the Committee's decision to a higher level, and failed to return his phone calls do not, without more, evidence a lack of impartiality.[4]

Kilgroe's Motion to File Supplemental Brief is denied.

AFFIRMED

1

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[4] We find no error in Judge Lew's denial of Kilgroe's motion to recuse Judge Keller. See Liteky v. United States, 510 U.S. 540, 555-56 (1994).

APPENDIX B

FILED
May 15, 2000
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN F. KILGROE,	)	
	)	No. 98-55240
Plaintiff-Appellant,	)	
	)	D.C. No. CV-
v.	)	96-04423-
	)	WDK
PACIFIC MARITIME ASSO-	)	
CIATION; INTERNATIONAL	)	
LONGSHOREMAN'S AND	)	ORDER
WAREHOUSEMAN'S UNION;	)	
Local 13, of International	)	
Longshore and Warehouse Union,	)	
	)	
Defendants-Appellees.	)	
	)	

Before: Browning, Tashima, Circuit Judges, and Jones, District Judge[1]

This court is without jurisdiction to issue a writ of mandamus against itself. Accordingly, the Petition for Writ 28 U.S.C. 1651, FRAP, Rule 21 to vacate Memorandum and to Disqualify Panel for Failure to Attempt to Make Good Faith Effort to Apply Law of Jurisdiction to Record before Court is dismissed for lack of jurisdiction.

[1] Honorable Robert E. Jones, United States District Judge for the district of Oregon, sitting by designation.

APPENDIX C

FILED
May 16, 2000
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN F. KILGROE,	) No. 98-55240
	) D.C. No. CV-
Plaintiff-Appellant,	) 96-04423-
	) WDK
v.	)
	) ORDER
PACIFIC MARITIME ASSO-	)
CIATION; INTERNATIONAL	)
LONGSHOREMAN'S AND	)
WAREHOUSEMAN'S UNION;	)
Local 13, of International Long-	)
shore and Warehouse Union,	)
	)
Defendants-Appellees.	)
	)

Before: BROWNING, TASHIMA, Circuit Judges, and JONES, District Judge[1]

The Panel as constituted above has voted to deny the petition for rehearing. Judges Browning and Tashima voted to deny the petition for rehearing en banc, and Judge Jones so recommended.

No active judge has requested a vote whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and Petition for rehearing en banc are denied.

No further filings will be accepted in this closed case.

---

[1] Honorable Robert E. Jones, United States District Judge for the district of Oregon, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

CV 96-4423-WDK Date: April 23, 1977

John F. Kilgroe v. Pacific Maritime Assoc. Intl. Union, et al.

Hon. William D. Keller Judge

Kathy Gault Paterson, Deputy Clerk

Court Reporter: None Present

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS :
None present	None present

PROCEEDINGS:

Before the Court is Plaintiff Kilgroe's motion to amend his complaint.

Plaintiff seeks leave of the Court to amend his complaint to add causes of action for wrongful termination. Specifically Plaintiff seeks to add claims for violations of the American's with Disabilities Act. ("ADA") and for tortious discharge in violation of public policy. Plaintiff asserts that certain events have occurred since the date of the filing of the original complaint, that are material to this action." Specifically, Plaintiff was not terminated until after the

original complaint was filed.

Federal Rule of Civil Procedure 15 (a) requires that leave to amend "Shall be freely given when justice so requires." This standard is applied with extraordinary liberality." Morongo Band of Mission Indians v. Rose, 893 F. 2d 1074, 1079 (9th Cir. 1990). Where there is lack of prejudice to the opposing party and the amended complaint is obviously not frivolous or made as a dilatory maneuver in bad faith, it is an abuse of discretion to deny such a motion. Hurn v. Retirement Fund Trust of Plumbing, Heating & Piping Industry of So. Calif., 648 F. 2d 1252, 1254 (9th Cir. 1981).

However, once the Court has issued its pre-trial scheduling order, a motion to amend is evaluated under the good cause standard of Rule 16. Under Rule 16, the Court must consider the party's diligence in seeking the amendment. Johnson v. Mammoth Recreations. Inc., 975 F. 2d 604, 609-610 (9th Cir. 1992).

Defendants oppose the amendment on two grounds. First, Kilgroe's motion to amend was untimely as it was not filed until after the cut-off date for amending pleadings. Second, Kilgroe did not act diligently in seeking to amend. In addition, Defendants assert that the amendment will necessitate a resetting of discovery Cut-off, Pre-trial, and trial dates and require further discovery.

Defendants assert that Kilgroe's motion should be rejected as untimely. The last day for amending pleadings was march 24, 1997. Plaintiff originally filed the motion and noticed a hearing for march 24, 1997. But the motion was rejected for lack of proper notice. Plaintiff re-filed with a new hearing date of April 7, 1997. Plaintiff's Procedural error is not sufficient to bar his amendment. It appears Plaintiff made a good faith effort to file his amended complaint by the cut-

off date.

Defendants further assert that Plaintiff waited four months to file his amended complaint from the time he was terminated. Plaintiff was terminated on November 4, 1996 and did not attempt to file his amended complaint until early March 1997. Defendants argue that Plaintiff was not diligent in seeking amendment and therefore has not demonstrated good cause under Rule 16. The mere fact that Plaintiff waited four months to seek to file an amended complaint does not evidence lack of diligence. Plaintiff who is proceeding pro se may have needed several months to develop his claims under the ADA. Given the very lenient standard for amending pleadings, a four month delay is not sufficient to bar an otherwise proper amendment.

Plaintiff's motion is GRANTED.

The Court reschedules the dates as follows:

Trial date:	November 4, 1997 at 9:30 am
Pre-trial conference:	October 20, 1997 at 2:00 pm
Dispositive Motions to be heard by	September 29, 1997
Discovery Cut-off	August 25, 1997
Expert designated date:	July 14, 1997
Motions to amend or join parties	July 14, 1997

IT IS SO ORDERED.

APPENDIX E

JOHN F. KILGROE
723 E. 3d Street, Apt 10
Long beach, California 90802
(562) 437-3557

Plaintiff Pro Se.

FILED
97 JUN 26 AM 10:58
Clerk, US District Court
Central Dist. Of Calif.
Los Angeles

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN F. KILGROE,

Plaintiff,

v.

PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 13 OF THE INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMAN'S UNION,

Defendants.

CASE NO 96-4423 WDK (AJWx)

NOTICE OF MOTION AND MOTION TO DISQUALIFY

JUDGE WILLIAM D. KELLER FOR PERSONAL BIAS OR PREJUDICE, DECLARATIONS IN SUPPORT THEREOF

28 U.S.C., § 144 AND § 455

Plaintiff hereby moves the court, pursuant to 28 U.S.C. § 144 AND § 455, for an order to disqualify Judge William D. Keller for personal bias or prejudice.

This motion is made on the ground that Judge William D. Keller has a personal bias or prejudice against Plaintiff in which his impartiality might be Questioned. 29 U.S.C. 455 (a), he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, 29 U.S.C. § 455 (b), (1) and he has a personal bias or prejudice either against Plaintiff or in favor of Defendants, 29 U.S.C. § 144.

This motion is based on this notice, the attached declarations in support thereof, a partial transcript of the proceedings of June 25, 1997, in this matter that I will order, and the court records and files in this action.

Dated: June 26, 1997

John F. Kilgroe

DECLARATIONS OF JOHN F. KILGROE

I, John F. Kilgroe, Plaintiff in this action, am over the age of eighteen, and if called could testify to the following of my own personal knowledge:

1. I have been diagnosed as suffering from a form of dyslexia and attention deficit disorder

2. I brought this action as an action for breach of a labor contract and breach of a duty of fair representation

seeking concerning the hiring hall practices of a hiring hall practices of Defendants Pacific Maritime Association (PMA) and the International Longshoremen's and Warehousemen's Union (ILWU) and Local 13 of the ILWU (Local 13)

3. This action was brought on June 24, 1996, On November 24, 1996 my dispatches at the hiring PMA/ILWU hiring hall were permanently revoked.. I amended to bring in wrongful termination issues, including a claim under the Americans with Disabilities Act. This amendment was granted on April 23, 1997, and defendants have filed answers to the first amended complaint placing at issue my status as being disabled under the Americans With Disabilities Act. And the propriety of the revocation of my dispatch privileges. Punitive Damages are also at issue.

4. On or about April 25-29, 1997, Defendants filed motions for summary judgment, one motion for PMA and a joint motion for the ILWU and Local 13. After continuances the matter was heard on June 23, 1997, and continued until June 25, 1997, at 1:00 am before judge William D. Keller. The motions for summary judgment concerned those issues in the original complaint but not the matters in the wrongful terminations claims.

5. At the June 25, 1997, hearing it was impossible for Judge Keller to know anything about the wrongful termination claims except What was apparent from the motion to amend, the first amended complaint and answers in the file, and the court personal observations of Plaintiff.

6. At the end of the hearing on June 25, 1997, Judge Keller was discussing with Counsel for the Defendants an appropriate judgment on the hiring hall issues but the termination issues had not been mentioned and were not before the court. At this point judge Keller appeared extremely irritated and stated that the Americans with Disabilities claims were likely no better that the mess that I had submitted on the hiring hall practices and that from his personal observation of the way I had conducted myself that

day I could not possible be suffering from attention deficit disorder. He asked me if I had been told why my dispatches were revoked. I attempted to answer. But Judge Keller ordered me not to talk. He threatened to use his Gavel which he said he rarely used but the previous time he used it he split the resting block in half and that if he used his gavel it would be vary bad for me. Judge Keller was visible irate which must have been obvious to all Defense Counsel and all the Court staff. Rather than assign causation of the split gavel resting block on his own loss of control Judge Keller assigned causation to some "obnoxious Attorney."

7. Judge Keller Said that he did not understand why I would possible want to sue my employer (in addition to the union). It is of course undisputed that a joint Employer/ Union committee permenantly revoked my dispatch privileges.

8. Judge Keller complained that the case was too complicated for him.

9. At the start of the hearing on June 25, 1997, Judge Keller asked Defense Counsel for their analysis of how to proceed. He said that he preferred their analysis not because it was better on the merits but because he preferred analysis from the persons of Defense counsel rather than the person of Plaintiff. During the hearing the court would not allow me to talk except in response to the court's questions and the court continually cut off those responses. Hence I was not able to respond to the Court or defense counsel's position"

10. At the start of the hearing, or perhaps it was the hearing of June 23, 1997, Judge Keller commenced the hearing by announcing that I was obviously "Type A" that he know that he himself was "Type A"and therefore knew exactly it was like to be "Type A" and that I too was obviously "Type A". I know of no basis for either assessment

11. Bases on the above I Conclude that J. Keller has prejudiced the wrongful terminations issues, in particular the Americans with Disabilities Act. claim, and that for that and

other reasons he is disqualified under 28 U.S.C., § 144 AND § 455.

I, John F. Kilgroe, declare under penalty of perjury of the laws of the United States, that the forgoing is true and correct and that this document is executed in Long Beach, California, on June 26, 1997.

/s/ John F. Kilgroe, Plaintiff Pro Se

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Minutes - General

CV 96-4423-WDK (AJWx) Date: July 1, 1977

John F. Kilgroe v. Pacific Maritime Association, et al.

PRESENT:

Hon. ANDREW J. WISTRICH, U.S. MAGISTRATE JUDGE

Y. Benayides,	(Blank)
Deputy clerk	Tape No.

ATTORNEYS FOR PLAINTIFF	ATTORNEYS FOR DEFENDANT

PROCEEDINGS: (in chambers)

The magistrate Judge has been informed that on June 25, 1997, the district Judge granted summary judgment as to all of plaintiff's claims with the exception of those related to plaintiff's termination. Plaintiff shall have eleven (11) days from the date of this order within which to withdraw his motion to compel further responses to discovery, in whole or in part, or to show cause why that motion should not be denied as moot in light of the District Judge's ruling.

IT IS SO ORDERED

cc: Parties

APPENDIX G

FILED
Clerk, U.S. District Court
July 8, 1997
Central District of California

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN F. KILGROE,

Plaintiff,

v.

PACIFIC MARITIME ASSOCIATION, ET AL.

Defendants.

CASE NO 96-4423 WDK (AJWx)

ORDER

Plaintiff John F. Kilgroe brings this motion to recuse Judge William D. Keller pursuant to 28 U.S.C. § § 144 AND 455 (a).

Recusal under sections 144 and 455 is appropriate if "a reasonable person with knowledge of all the facts would conclude that the Judge's impartiality might reasonably be questioned." O'Connor v. Nevada 27 F. 3d 357, 363-64 (9th Cir. 1994); United States v. Studley 783 F. 2d 934 (9th Cir

1986); Liteky v. United States, 114 S. Ct. 1147 (1994).

In this case, Judge Keller's comments to Plaintiff were not enough to indicate personal prejudice or bias. Therefore, because no reasonable person with knowledge of all the facts would conclude that Judge Keller's impartiality might be questioned, the Court denies the motion for recusal.

IT IS NO ORDERED.

RONALD S. W LEW
RONALD S. W. LEW
United States District Judge

DATED: July 7, 1997

No. CV- 96- 4423-WDK Kilgroe v. Pacific Maritime Association; Plaintiff's Motion for Recusal

APPENDIX H

HOLGUIN & GARFIELD
A PROFESSIONAL LAW CORPORATION
STEVEN HOLGUIN, CSB# 115768
SATOSHI YANAI CSB# 186355
3780 Wilshire Boulevard, Sixth Floor
Los Angeles, California 90010
Telephone Number (213) 381 1828
Facsimile Number: (213) 381 3035

LEONARD, CARDER, NATHAN,
ZUCKERMAN, ROSS, CHIN & REMAR
RICHARD ZUCKERMAN
1188 Franklin Street, Suit 201
San Francisco, California 94109
Telephone Number (415) 771 6400
Facsimile Number (415) 771-7010

LODGED
Clerk, U.S. District Court
Jul 2 1997
Central Dist. Of Calfiornia

FILED
Clerk, U.S. District Court
Jul 10 1997
Central Dist. Of California

ENTERED
Clerk, U.S. District Court
Jul 11 1997
Central Dist. Of California

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN F. KILGROE,

Plaintiff,

v.

PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 13 OF THE INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION,

Defendants.

CASE NO 96-4423 WDK (AJWx)

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This action came on for hearing before the Court, on June 23 and 25, Hon. William D. Keller, District Judge Presiding, on Motions for Summary judgement by defendants pacific Maritime Association, the International Longshoreman's and Warehousemen's Union, and local 13 of the International Longshoreman's and Warehousemen's Union. The ruling of this Court made at that hearing and embodied in this order is based upon the following course of events:

1. On June 24, 1996, plaintiff John Kilgroe filed a complaint alleging fourteen "claims for relief" pursuant to Section 301 of the Labor Management Relations Act. 29

U.S.C. § 185, that addressed alleged breaches of the collective bargaining agreement and the union defendants' duty of fair representation.

2. Plaintiff submitted a motion to amend complaint in March, 199(7), adding claims under the Americans with Disabilities Act and for "Tortious Discharge in Violation of Public Policy: Plaintiff's motion was granted by this Court in Minute order Dated April 23, 1996.

3. On April 25, 199(7), prior to receipt of this court's minute order re: plaintiff's motion to amend, defendants International Longshoremen's and Warehousemen's Union and local 13 of the International Longshoremen's and Warehousemen's Union filed a motion for summary judgment, alleging that most of Plaintiff's claims were barred by the statute of limitations and that plaintiff failed to establish any genuine factual issue that defendants had breached their duty of fair representation.

4. On April 25, 199(7), prior to receipt of this court's minute order re: plaintiff's motion to amend, defendants pacific Maritime Association filed a motion for summary judgment, alleging that plaintiff failed to establish any genuine factual issue that defendant had breached the Collective bargaining agreement.

5. On June 23, and 25, 1997, this court held a hearing to consider co-defendants' motions for summary judgment. The motions and this Court's ruling were framed in reference to plaintiff's original complaint..

6. The first two causes of action in plaintiff's First Amended Complaint (for "Breach of Labor Contract" and "Breach of Duty of Fair Representation") substantially incorporate the claims contained in plaintiff's initial complaint (although two of plaintiff's original claims, the Fifth and the Thirteenth, were dropped and are not included in plaintiff's First Amended Complaint). Paragraph 11 (divided into 12 sections identified as A through L) of plaintiff's First amended Complaint identifies alleged breaches of the

collective bargaining agreement by defendants PMA . Paragraph 17 alleges that he union defendants breached their duty of fair representation by joining PMA in carrying out the acts identified in paragraph 11 and failing to process plaintiff's grievances relating to those subjects.

7. The substance of eleven of plaintiff's twelve claims for breach of the collective bargaining agreement and the associated duty of fair representation in the First Amended Complaint (Paragraphs 11 (A), (b) and (D) –(L) and paragraph 17 insofar as it relies upon the foregoing sections of paragraph 11) were decided in a partial summary judgment context by this Court's rulings at the hearing of June 25, 1997. Those rulings corresponding to plaintiff's claims in his First Amended Complaint as follows:

Paragraph 11 (A): Dismissed pursuant to this Court's ruling that the First claim for relief in plaintiff's initial complaint is barred by the statute of limitations;

Paragraph 11 (A): Dismissed pursuant to this Court's ruling that the First claim for relief in plaintiff's initial complaint is barred by the statute of limitations;

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Paragraph 11 (A): Dismissed pursuant to this Court's ruling that the First claim for relief in plaintiff's initial complaint is barred by the statute of limitations;

Paragraph 11 (A): Dismissed pursuant to this Court's ruling that the First claim for relief in plaintiff's initial complaint is barred by the statute of limitations;

Paragraph 11 (A): Dismissed pursuant to this Court's ruling that the First claim for relief in plaintiff's initial complaint is barred by the statute of limitations;

Paragraph 11 (A): Dismissed pursuant to this Court's ruling that the First claim for relief in plaintiff's initial complaint is barred by the statute of limitations;

Paragraph 11 (B): Dismissed pursuant to this Court's

ruling that the Eight for relief in plaintiff's initial complaint is barred by the statute of limitations;

Paragraph 11 (C):This paragraphs relates to the revocations of Plaintiff's casual dispatch privileges and thus was not before the court on June 23 and 25; therefore this claims survives this court's ruling on June 25, 1997;

Paragraph 11 (D): Dismissed pursuant to this Court's ruling that the Second for relief in plaintiff's initial complaint is dismissed due to plaintiff's failure to raise a genuine issue of fact at the his failure to exhaust administrative remedies.

Paragraph 11 (E): Dismissed pursuant to this Court's ruling that the Third claim relief in plaintiff's initial complaint is barred by the statute of limitations;

Paragraph 11 (F): Dismissed pursuant to this Court's ruling that the Fourth claim for relief in plaintiff's initial complaint is barred by the statute of limitations;

Paragraph 11 (G): Dismissed pursuant to this Court's ruling that the Sixth claim for relief in plaintiff's initial complaint is barred by the statute of limitations;

Paragraph 11 (H): Dismissed pursuant to this Court's ruling that the Seventh claim for relief in plaintiff's initial complaint is barred by the statute of limitations;

Paragraph 11 (I): Dismissed pursuant to this Court's ruling that the Eighth claim for relief in plaintiff's initial complaint is barred by the statute of limitations;

Paragraph 11 (J): Dismissed pursuant to this Court's ruling that the Ninth claim for relief in plaintiff's initial complaint is dismissed due to the failure to establish a genuine issue of fact to support his contention that there was a breach of the collective bargaining agreement.

Paragraph 11 (K): Dismissed pursuant to this Court's ruling that the Tenth claim for relief in plaintiff's initial complaint is dismissed due to plaintiff's failure to raise a genuine issue of fact at the his failure to exhaust administrative remedies.

Paragraph 11 (L): Dismissed pursuant to this Court's

ruling that the Eleventh claim for relief in plaintiff's initial complaint is barred by the statute of limitations;

This Court's ruling also dismisses allegations of Paragraph 17 of the First Amended Complaint insofar as they rely upon the dismissed sections of paragraph 11 listed above.

Based on the forgoing the evidence submitted by all parties in their papers and at the hearing on this matter, it is the ruling of this Court that defendants are entitled to judgment in their favor on plaintiff's claims for breach of the collective bargaining agreement and breach of the duty of fair representation with regard to the issues raised in paragraphs 11 (A), (B) and (D)-(L) of plaintiff's First amended Complaint and in paragraph 17 insofar as it relies upon the sections of paragraph 11.

Plaintiff's remaining claims and issues are: (1) a claim that the actions alleged in paragraphs 11 (C) breached the Collective Bargaining Agreement; (2) a claim of action alleged in paragraphs 17 insofar as it relies upon paragraphs 11 (C) are a breach of the duty of fair representation (3) a claim for violation of the Americans with Disabilities Act. and (4) a claim for Tortious Discharge in Violation of Public Policy. These remaining claims survive this Order and must be prosecuted and defended in accordance with this Court's case management schedule.

IT IS SO ORDERED

Dated 7/9/97

/s/ William D. Keller
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
Civil Minutes - General

CV 96-4423-WDK (AJWx) Date: July 11, 1997

John F. Kilgroe v. Pacific Maritime Association, et al.

PRESENT:

Hon. ANDREW J. WISTRICH, U.S. MAGISTRATE JUDGE

Martha Iberra,	Blank
Acting Deputy Clerk	Tape No.
ATTORNEYS FOR PLAINTIFF	ATTORNEYS FOR DEFENDANT

PROCEEDINGS: (in chambers)

On July 11, 1997, plaintiff submitted a document responding to the order dated July 1, 1997. Although the document does not conform to the requirements of the Local Rules, see Local Rule 2.10, the Clerk is directed to file the document in the interests of judicial economy. Considering all the circumstances, Plaintiff's motion to compel further discovery is denied without prejudice to its being refiled at a later stage of this case based upon a complete and detailed explanation of the continuing relevance, if any of each of the discovery request at issue.

IT IS SO ORDERED
cc: Parties

APPENDIX J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Minutes - General

CV 96-4423-WDK Date: Oct. 29, 1997
John F. Kilgroe v. Pacific Maritime Assoc. Intl. Union, et al.

DOCKET ENTRY

FILED
Clerk, U.S. District Court
Oct 29 1997
Central District of California

PRESENT;

Hon. William D. Keller Judge

Amalia Carrillo — None Present
Deputy Clerk — Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
None present

ATTORNEYS PRESENT FOR DEFENDANTS
None present

PROCEEDINGS:

Before the Court is Plaintiff's and Defendants' motions for summary judgment, and Plaintiff's motion for reconsideration, motion for summary judgment on the reconsideration claims, and motion to reschedule trial and cut-off dates.

1) Plaintiff's motion to reconsider/motion for summary judgment/motion to reschedule trail and cut-off dates.

Plaintiff filed three motion on August 11, 1997 seeking reconsideration, summary judgment and rescheduling of trial and cut-off dates. The motion for reconsideration is DENIED for reasons previously identified by the Court. Because both are contingent upon the Court granting Plaintiff's motion to reconsider, the motions for summary judgments and rescheduling are DENIED.

2) Defendants' and Plaintiff's motion for summary judgment

Plaintiff and Defendants have each filed motions for summary judgment on Plaintiff's remaining four caused of action.

With respect to Plaintiff's Third Cause of action, for violation of the Americans with Disabilities Act, summary judgment is GRANTED for Defendants on the bases of Plaintiff's failure to provide evidence sufficient to show an issue of fact regarding causing. Plaintiff failed to provide any evidence that would allow a finding that he was fired due to his alleged disability.

As to Plaintiff's Fourth Cause of Action, for tortious discharge in violations of public policy, Summary judgment is GRANTED for Defendants on the basis of preemption under Operating Engineer Pension Trust v. Wilson 915 F. 2d 535, 538 (9th Cir. 1990)

Regarding Plaintiff's first Cause of action, for breach of contract, the Court finds that, under Hines v. Anchor Motor Freight 424 U.S. 554, 570 (1976), Plaintiff cannot succeed on a breach of contract action unless he can first establish a breach of the duty of fair representation by the Union. Therefore. the Court withholds judgment on this cause of action until the breach of the duty of fair representation issue is resolved.

With respect to Plaintiff's Second Cause of Action, for breach of the duty of fair representation, Plaintiff argues that the union representative(s) on the Joint Port Labor

Relations Committee Owed Plaintiff a duty of fair representation. The Court finds that there is no duty of fair representation owed to employees by the Joint Committee, or union representatives on that committee. Therefore, as to Plaintiff's argument that the Union breached its duty of fair representation by virtue of any operation or decision of the Joint Port Labor Relations Committee, partial summary judgment is GRANTED for Defendants

However, at ¶ 18 of Plaintiff's First Amended Complaint, Plaintiff alleges that the Union "breached their duty of fair representation by failing to represent Plaintiff's interest prior to and after his termination by Defendant PMA."

Plaintiff has 20 days from the date of this Order to Provide an amended opposition to the Defendants' motion for summary judgment on Plaintiff's Second Cause of Action. Plaintiff must state with particularity. Any facts or evidence that show a genuine issue of fact regarding the Union's breach of the duty of fair representation. The Court emphasizes that the remaining issue involves only the alleged breach of duty by the Union, exclusive of its Role on the Joint Port Labor Relations Committee. The Plaintiff is not to address any other topic or issue in the amended opposition, and is not to revisit any issue which the Court has already ruled upon. Plaintiff's amended opposition is limited to 15 pages. Any failure to strictly follow these time, length, and subject-matter limitations will result in the granting of Summary judgment and the termination of the case.

Defendants may file a joint reply to Plaintiff's amended opposition within 30 days of the date of this Order. Defendants are also only permitted to address the limited issue of the alleged breach of the Union's duty of fair representation. Defendants' reply is limited to 15 pages.

IT IS SO ORDERED.

APPENDIX K

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Minutes - General

CV 96-4423-WDK Date: December 23, 1997

John F. Kilgroe v. Pacific Maritime Assoc. Intl. Union, et al.

FILED
Clerk, U.S. District Court
Dec. 23, 1997
Central District of California

ENTERED
Clerk, U.S. District Court
Dec. 29, 1997
Central District of California

PRESENT:

Hon. William D. Keller Judge

Amalia Carrillo,	None Present
Courtroom Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS
None present	None present

PROCEEDINGS:

Before the Court are Plaintiff's motion to amend and motion for reconsideration of this Court's October 29, 1997 order granting partial summary judgment to defendants. Also before the Court is Defendants' motion for summary judgment, with regard to Plaintiff's causes of action for breach of the duty of fair representation, and breach of contract.

I) Plaintiff's motion for Reconsideration

On October 29, 1997, this Court granted summary judgment for Defendants on Plaintiff's third Cause of Action, for violation of the Americans with Disabilities Act, and on Plaintiff's Fourth Cause of Action, for tortious discharge in violation of public Policy. In addition, the Court found that summary judgment on Plaintiff's First Cause of Action, for breach of contract, was contingent upon Plaintiff establishing a breach of the duty of fair representation under Hines v. Anchor Motor Freight, 424 U.S. 554, 570 (1976). The Court then invited Plaintiff to provide limited supplemental opposition to Defendants' motion for summary judgment, focusing solely on the breach of the duty of fair representation claim.

Plaintiff now moves this Court to reconsider that order, citing Local Rule 7.16 and Fed. R. Civ. P. 59 as authority. The Court finds that Rule 59 is not applicable, given that plaintiff's motion came 23 days after entry of the order. Not within 10 days as required by Rule 59. Secondly, the Court finds that reconsideration is not called for under Local Rule 7.16, which requires a showing of a material difference in fact or law, or a manifest showing of a failure to consider material facts presented to the Court. Plaintiff makes no such showing, presenting neither evidence of new facts or law, nor a manifest failure to consider material facts presented to the Court. Instead, plaintiff simply re-argues the same facts and positions that he has previously argued numerous times. Such argument in a Rule 7.16 motion is

specifically prohibited by that rule.

Therefore, the Plaintiff's motion for reconsideration is DENIED.

II Plaintiff's Motion to Amend

Five days after the Court's October 29, 1997 order granting partial summary judgment to defendants plaintiff filed a motion to amend his complaint. Plaintiff purports to state, in his proposed Second Amended complaint, causes of action for (1) breach of contract; (2) breach of the duty of fair representation; (3) violation of the ADA; (4) disability discrimination under the Fair Employment and Housing Act; and (5) wrongful termination in violation of public policy Plaintiff is clearly attempting to evade the Court's summary judgment rulings on the ADA and Public Policy causes of action. As the Ninth Circuit has held, "(a) motion for leave to amend is not a vehicle to circumvent summary judgment." Schlacter-Jones v. General Tel. of Calif 936 F. 2d 435, 443, (9th Cir. 1991)

In addition, plaintiff has failed to comply with this Court's order re: motion practice. That order requires that the party meet and confer 30 days prior to filing any motion before the Court:

> Counsel contemplating filing any motion is first required to contact opposing counsel to thoroughly discuss the substance of the proposed motion and potential resolution . . . . This discussion shall take place at least (30) calendar days prior to the filing of a motion. Needless or frivolous motion practice is unacceptable. . . . The Court will not accept a motion which fails to comply with any of the foregoing requirements.

Plaintiff alleges that he satisfied the meet and confer requirement by meeting with defendants' counsel on October

28, 1997. Defendants dispute that this meeting ever took place. Even assuming that the meeting took place as alleged by Plaintiff, it would not satisfy the 30 day meet and confer requirement.

For the foregoing alternative reasons, Plaintiff's motion for leave to amend is **DENIED**.

III Defendant's Motion for Summary Judgment.

Responding to the Court's October 29, 1997 order, plaintiff has submitted a supplemental opposition to defendants' Motion for summary judgment, regarding the issue of the defendant unions's breach of the duty of fair representation. The Court's October 29, 1997 order, provided, in pertinent part:

> With respect to Plaintiff's Second Cause of Action, for breach of the duty of fair representation, Plaintiff argues that the union representative(s) on the Joint Port Labor Relations Committee Owed Plaintiff a duty of fair representation. The Court finds that there is no duty of fair representation owed to employees by the Joint Committee, or union representatives on that committee. Therefore, as to Plaintiff's argument that the Union breached its duty of fair representation by virtue of any operation or decision of the Joint Port Labor Relations Committee, partial summary judgment is GRANTED for Defendants

However, the Court found that there might be a valid issue regarding another aspect of the duty of fair representation. In an effort to give Plaintiff every opportunity to present his case, the Court specifically noted this potential issue. And

requested briefing from Plaintiff as follows:

> However, at ¶ 1 18 of Plaintiff's First Amended Complaint, Plaintiff alleges that the Union "breached their duty of fair representation by failing to represent Plaintiff's interest prior to and after his termination by Defendant PMA."
>
> Plaintiff has 20 days from the date of this Order to Provide an amended opposition to the Defendants' motion for summary judgment on Plaintiff's Second Cause of Action. Plaintiff must state with particularity. Any facts or evidence that show a genuine issue of fact regarding the Union's breach of the duty of fair representation. The Court emphasizes that the remaining issue involves only the alleged breach of duty by the Union, exclusive of its Role on the Joint Port Labor Relations Committee. The Plaintiff is not to address any other topic or issue in the amended opposition, and is not to revisit any issue which the Court has already ruled upon. Plaintiff's amended opposition is limited to 15 pages. Any failure to strictly follow these time, length, and subject-matter limitations will result in the granting of Summary judgment and the termination of the case.

The Plaintiff argues that the union breached their duty of fair representation by failing to provide him with a representative at the joint port committee hearing. However, plaintiff admits that he never requested a representative, or assistance from the union. Defendants point out that there is no duty to provide representative, and no right to such

representative, unless the union member first makes a request for such assistance. See NLRB v. Weingarten, 420 U.S. 251, 257 (1975) ("the right arises only in situations where the employee request representation"); railway Labor Executives' Ass'n v. Burnley, 839 f. 2d 575, 591 (9th Cir. 1988) (The right to union representation arises only upon the employee's request). Plaintiff attempts to distinguish his situation by arguing that the duty arose because the union knew o the disciplinary hearing. Plaintiff cites no authority supporting this position.

Plaintiff also contends that the union breached its duty of fair representation by refusing to provide him with a copy of the employer complaint. However, this argument is based on alleged actions of the union members of the joint port committee hearing. Plaintiff contends that "at the start of the disciplinary hearing I requested a copy of the employer complaint, which the union refused to provide." Amd. Opp. 12:18-19. As the Plaintiff has vigorously pointed out, the only union representatives present at the hearing were those who were members of the joint port committee. In other words, plaintiff is again attempting to argue that the alleged actions of the port committee support a finding that the union breached their duty of fair representation to the plaintiff. The court has already rejected this argument, and ordered that it not be repeated here.

In addition, defendants argue that any such failure was harmless, given that the plaintiff was read the contents of the complaint during the hearing. As defendants point out, there is considerable authority that the failure to provide the complaint to the plaintiff would not be a breach of the duty of fair representation . See Singer v. Flying Tiger Lines, Inc. 652 F. 2d 1349, 1354, (9th Cir. 1981); Higdon v. United Steelworkers of America, 706 F. 2d 1561, 1562 (11th Cir. 1983; Whitten v. Anchor Motor Freight, Inc. 521 f. 2d. 1335, 1341 (6th Cir. 1975), cert denied 425 U.S. 981 (1976)

Plaintiff argues that the union breached its duty of fair

representation by "Agreeing with the employer to termination rather than disagreeing and referring the matter to a higher level" Again, this argument largely attacks the actions of the joint port committee, rather than the actions of the union. To the extent that the argument is based on the union's failure to appeal the joint port committee's determination, plaintiff first fails to present any evidence showing that the union had the ability, under the Collective bargaining agreement to appeal the committee's ruling. Second, plaintiff fails to present specific evidence showing that such failure by the Union, even if it were possible, amounts to a breach of the duty of fair representation. For plaintiff to survive summary judgment, he must provide significant probative evidence tending to show "fraud, deceitful action, or dishonest conduct on part of the Union: Motor Coach Employees v. Lockridge 402 U.S. 274, 299 (1971) Plaintiff had failed to present such evidence.

For the foregoing reasons, the defendants' motion for summary judgment, on the issues remaining in this case is **GRANTED**.

Because there are no further issues remaining, this order represents a final judgment in favor of defendants, and hereby terminates this case.

IT IS SO ORDERED.

EXHIBIT L

Southern California Area

Pacific Maritime Association

April 30 1996

Mr. John Kilgroe, # NG 3014
723 E. 3d Street, Apt. 10
Long Beach, Ca. 90802

Dear Mr. Kilgroe:

The Joint Port Labor Relations Committee has determined that your claims do not properly fit the specific requirements of Section 13 of the Pacific Coast Longshore Contract Document..

The Joint Labor Relations Committee has reached agreement on these claims, therefore, the grievance machinery is exhausted.

Enclosed please find the stenciled and final copies of the Joint Labor Relations Committee minutes you requested.

Respectfully,

/s/_____
Paul Russell
Labor Relations

Assistant

PR: mob

enclosure

EXHIBIT M

ILWU-PMA
JOINT COAST LABOR RELATIONS COMMITTEE

Post office Box 7861
San Francisco, California 94120

International Longshoremen's and Warehousemen's Union
1188 Franklin Street
San Francisco, CA 94109

Pacific Maritime Assn.
635 Sacramento Street
San Francisco, CA 94111

May 17, 1996

VIA CERTIFIED MAIL P 077 221 767

Mr. John Kilgroe, # NG 3014
723 E. 3d Street, Apt. 10
Long Beach, Ca. 90802

Re: Your letter of may 10, 1996– Appeal of JPLRC Decision April 30, 1996

Dear Mr. Kilgroe:

The Coast Labor Relations Committee agrees that in view of the decision of the Joint Port Labor Relations Committee, your claims do not properly fit the requirements of Section 13. The grievance machinery is exhausted.

Very truly yours,

ILWU-PMA
JOINT COAST LABOR RELATIONS COMMITTEE

For The Union

/s/unidentifiable

/s/unidentifiable

For the Employers:

/s/unifentifiable

cc Los Angeles/Long Beach JPLRC

EXHIBIT N

ILWU-PMA
JOINT COAST LABOR RELATIONS COMMITTEE

Post office Box 7861
San Francisco, California 94120

International Longshoremen's
and Warehousemen's Union
1188 Franklin Street
San Francisco, Ca. 94109

Pacific Maritime Assn.
635 Sacramento Street
San Francisco, CA
04111

June 3, 1996

VIA CERTIFIED MAIL P 077 221 768

Mr. John Kilgroe
723 E. 3d Street, Apt. 10
Long Beach, Ca. 90802

Re: Your letter Received May 31, 1996

Dear Mr. Kilgroe:

In response to your request for an arbitration hearing in the matter of your grievances, you are advised that there is no appeal of the CLRC decision of May 17, 1996. As stated in the May 7, 1996 CLRC decision the grievance machinery is exhausted.

Very truly yours,

ILWU-PMA
JOINT COAST LABOR RELATIONS COMMITTEE

For The Union	For the Employers:
/s/unidentifiable	/s/unidentifiable
/s/unidentifiable	

cc Los Angeles/Long Beach JPLRC

EXHIBIT O

F090141
11.11.00

Employer complaint Transaction Report on 3/96
page 1

564523217 Kilgroe, John 564-52-3217

complaint 7036.96 Addition on 10/23/1996 in SOUTHERN CALIFORNIA by GLLOYD

Company: Marine Terminals Corp in Port: Long Beach

Current STATUS of complaint: open

DISPATCH status: Dispatchable at this time

Received 10/23/1996

Occurred 9/18/96

Union Notified: 10/23/1996 Class of Work: 1

Violations: Damage to Company Property

History of Meetings:

EXHIBIT P

ON 10/23

OFF

EMPLOYER COMPLAINT

Name of Employer MARINE TERMINALS CORP

Name of Vessel EVER GOODS Berth No. T1223

Name of Owner EVERGREEN AMERICA

Date of Complaint 09/24/96

Date and Time of Incident 09/18/96 14:30 HRS

Company Complaint No. 96-64

To Labor Relations Committee:

Complaint is hereby filed against (Show name, work number and category of man involved):

NG 3014 564-52 32
JOHN KILGROE
UTR

Nature of Incident: (Describe operation and incident in detail, use reverse side if necessary.)

MR. KILGROE WAS DRIVING UTR # 5719

HE STRUCK AND DAMAGED THE RIGHT

FRONT DOOR PANEL ON TRUCK (9B013333) OVER AT ROW "J" SPOT 385. MR. KILGROE WAS TRYING TO PULL THE CHASSIS OUT FROM ROW K WHEN THIS ACCIDENT HAPPENED. WHEN MR. KILGROE PULLED AWAY FROM THIS ACCIDENT HE GOT INTO ANOTHER ONE. HE THEN STRUCK AN MTC PICK UP TRUCK AND DAMAGED THE LEFT FRONT DOOR.

Sections of Agreement Violated: Damage to Co. property
Supt. G. P. TSAI Foreman B. Perez Gang or Job Steward.

B/A Present Yes____ No_X Name_____
Replacements Ordered: Yes No X Time

Additional comments which will confirm the above statements, i.e. witnesses, production figures, statements, type of cargo, etc.

THIS ACCIDENT WAS WITNESSED BY MR. ALBERT REA (40654)

Signed C. P. TSAI Title: Supt.

SPLRC 154-96, 11/4/96; Guilty, Privileges revoked.

EXHIBIT Q

Sp. LLRC Meeting No. 154-96, November 4, 1996

13. E.C. #n36-96- J. Kilgroe, #NG3014. SSN 564 52-3217-
DAMAGE TO COMPANY PROPERTY– S.S. EVER
GOODS, BERTH TI 228 9/18/96
MARINE TERMINALS CORPORATION

The complaint states that, on September 18, 1996, Mr. Kilgroe was hired as a UTR driver on the first shift. At approximately 2:30 P.M., Mr. Kilgroe was driving his UTR and struck and damaged the right front door panel of a truck that was located in row J, spot #385. After the impact, Mr. Kilgroe drove away from the accident and struck another vehicle, damaging the left front door. Mr. Kilgroe appeared before the committee and presented a letter which served as a motion to strike the complaint. Mr. Kilgroe feels the Committee is biased against him and the Employer complaint was filed untimely.

The Committee explained to Mr. Kilgroe that, in accordance with Section 17.81 of the PCLCD, a complaint must be filed by the Employers within 30 days of the incident. In addition, the Committee informed Mr. Kilgroe that the Joint Port Labor Relations Committee is the forum where complaints against casual longshoremen are heard and therefore the complaint will be adjudicated by the Committee.

Mr. Kilgroe stated the accidents occurred as described in the complaint and that the accidents were due to his inability to focus properly, which is a side effect of his prescribed medication.

Mr. Kilgroe presented the container containing he prescribed medication; however, no. medical documentation was

presented.

The Committee noted the warning label on the medication bottle states, "May cause drowsiness, Avoid hazardous activity and use care when operating a car or dangerous machinery."

Further Mr. Kilgroe admitted that he was aware of and ignored the warning label on the medications because he though that the medication would enhance his driving capabilities.

The Committee agreed that Mr. Kilgroe violated Section 17.81 and 17.84 of the PCLCD and Section 6 of the Rules and Procedures Regarding Identification of Casual Longshoremen by ignoring the warning labels on the medication and accepting a UTR job while taking the above-noted medications.

The Committee agreed to permanently revoke Mr. Kilgroe's casual dispatch privileges.

EXHIBIT R

EXHIBIT "A"

Plaintiff's Fourteen Claims for Relief:

First Claim for Relief: Plaintiff alleges that "30-day" casual cards are issued to members of "sister union" who are engaged in a bona fide strike, that this is prohibited by the contract, and that the union filed to process his grievance to arbitration.

Second Claim for Relief: Plaintiff alleges that children of deceased longshoremen are granted the registration privileges of their late parents. That this is prohibited by the contract, and that the union filed to process his grievance to arbitration.

Third Claim for Relief: Plaintiff alleges that "mechanics apprentices" are dispatched to longshore work , the mechanics are given preference in elevation to registered status, That these practices are prohibited by the contract, and that the union filed to process his grievance to arbitration.

Fourth Claim for Relief: Plaintiff alleges that "30-day"cards were issued to the 18 named individuals, that he has been denied information about these individuals, that this is prohibited by the contract, and that the union filed to process his grievance to arbitration.

Fifth Claim for Relief: Plaintiff alleges that Ray Familathe and unnamed other individuals have been elevated to limited registration status without having achieved the requisite hours as a casual worker, that this is prohibited by the contract, and

that the union filed to process his grievance to arbitration.

Sixth Claim for Relief: Plaintiff alleges that registered and limited registered longshoremen can be dispatched more than once in 24 hours period ("double backing") and more than six shifts per week that casual workers do not have this privilege, that this is prohibited by the contract, and that the union filed to process his grievance to arbitration.

Seventh Claim for Relief: Plaintiff alleges that when a pick line is being honored by the Unions, the registered who would be dispatched to that job can be dispatched to another job, thus displacing casuals, that this is prohibited by the contract, and that the union filed to process his grievance to arbitration.

Eighth Claim for Relief: Plaintiff alleges that the employer "flooded" the casual hall by allowing more workers to enter the rotation, thus decreasing the shift opportunities for the individuals casuals like plaintiff, that this is prohibited by the contract, and that the union filed to process his grievance to arbitration.

Ninth Claim for Relief: Plaintiff alleges that registered and limited registered longshoremen are granted travel pay of $3.00 per shift and that casuals do not get such travel pay, that this is prohibited by the contract, and that the union filed to process his grievance to arbitration.

Tenth Claim for Relief: Plaintiff alleges that Defendants maintain "unreasonable" preferences because: (a) it takes 10 to 15 years to be elevated to fully registered longshoremen; (b) it takes to to 15 years to achieve union voting rights; (c) this process is further slowed by practices like double backing and (d) only about half of longshoremen may vote and enjoy membership . Plaintiff further alleges that this is prohibited by

the contract.

Eleventh Claim for Relief: Plaintiff alleges that on August 7, 1995, he was deprived of work because he was dispatched but could not work due to a wildcat strike carried out by the union, that this is prohibited by the contract, and that the union filed to process his grievance to arbitration.

Twelfth Claim for Relief: Plaintiff alleges that on July 17, 1995, he entered the Local 13 offices to retrieve a complaint form to complain about the proposed issue of temporary casual cards to high school teens. Plaintiff further alleges that he was verbally abused by a local 13 officer, that he had been intimidated by other officers, and the union filed to process his grievance to arbitration.

Thirteenth Claim for Relief: Plaintiff alleges that during wildcat strikes on August 7, 1995 and February 5, 1996, that officers of Local 13 failed to advocate against the individuals involved in the strike, that they actually planned the strikes that Plaintiff was subjected to an atmosphere of hostility during the strikes, that these activities are prohibited by the contract, and that the union filed to process his grievance to arbitration.

Fourteenth Claim for Relief: Plaintiff alleges that Defendants have violated the contract and the duty of fair representation by their continued refusal to forward his grievances to arbitration, and that he has incurred the equivalent of attorneys fees by his efforts to have grievances arbitrated.

EXHIBIT S

CONTRACT PROVISIONS INVOLVED

A copy of the Pacific Coast Longshore Contract Document, is Attached To the Employers motion for summary judgment, CR 3 as Exhibit B. The following Sections are taken from this document:

¶ 1: "This Contract Document , as Supplemented by agreements(Port Supplements and Working Rules) for the various part areas covered hereby, shall apply to all employees who are covered herein. It is the intent of this Contract Document to preserve the existing work of such employees."

¶ 8.43: "There shall be no favoritism or discrimination in the hiring or dispatching or employment of any longshoremen qualified and eligible under the agreement."

¶ 13 § 13.1: "There shall be no discrimination in connection with any action subject to the terms of this agreement either in favor of or against any person because of membership or nonmembership in the Union, activity for or against the Union or absence thereof, or race, creed, color, sex age or national origin or religious or political belief'
¶ 17.4 "When any longshoremen (whether a registered longshormen or an applicant for registration or a casual longshoremen) claims that he has been discriminated against in violation of Section 13 of this agreement, he may at his option and expense, or either the Union or the Association may at its option and at their joint expense, have such complaint adjudicated hereunder, which procedure shall be the exclusive remedy for any such discrimination"
¶ 17.41: "Such remedy shall be begun by filing of a grievance with the Joint Port Labor Relations Committee setting forth

the grievance and the facts as to the alleged discrimination. Such grievance shall be timely if presented within 10 days of the alleged discrimination . Such grievance shall be investigated by the Joint Port Labor Relations Committee at a regular or special meeting of the committee at which the individual involved shall be permitted to appear to state his case, at which time he may present oral and written evidence and argument".

¶ 17.411: "With respect to any claim of violation of Section 13 the Joint Port Labor Relations Committee Shall extend the time for filing such claim beyond the time established in Section 17.41whenever such extension is necessary because the because the period of limitations otherwise applicable is determined to be unlawful or because in the judgment of the Committee in the exercise of its sound discretion, such an extension otherwise necessary to prevent inequity but in no event shall the time for such filing of such claims be extended beyond 6 months from the date of the occurrence of the alleged discrimination."

¶ 17.42: "Either the employer, the Union or the man involved may appeal the decision of the Joint Port Labor Relations Committee . Such appeal shall be to the Joint Coast Labor Relations Committee by letter addressed to the Joint Coast Labor Relations Committee. To be timely, such appeal must be delivered or mailed within 7 days of the decision of the Joint Port Labor Relations Committee."

¶ 17.421: "If such appeal is taken within the time limits allowed, the Joint Coast Labor Relations Committee shall either confirm or reverse or modify the decision of the Joint Port Labor Relations Committee without any further hearing, or order a further hearing and thereupon issue its decision on the basis of the entire record including both hearings."

¶ 17.43: "An appeal from the decision of the Joint Coast Labor Relations Committee can be presented to the Coast Arbitrator (or by agreement of the Joint Coast Labor Relations Committee to an Area Arbitrator) by the individual involved, the Employers or the Union. An Appeal to the Coast Arbitrator filed by an applicant for registration or a casual longshoremen involving the subject of registration shall be permitted only for those grievances which the Joint Coast Labor Relations Committee, in its sole discretion, certifies to the Coast Arbitrator that the facts introduced in support of the grievance into the record of the prior proceedings, if unrebutted, may support a finding of a violation of the grievant's Section 13 rights under the agreement. Appeal shall be by a written request for an arbitrator's hearing mailed or delivered to the Union and Employers representatives if by an individual, or to the individual and the other parties representative on the Joint Coast Labor Relations Committee if by either the Union or the employers. Such an appeal shall be timely only if such request for an arbitration hearing is so filed with the Joint Coast Labor Relations Committee no later than 7 days after issuance of the decision f the Joint Coast Labor Relations Committee from which an appeal to the Arbitrator is taken."

§ 17.8: " Penalties for work stoppages, assault, Pilferage, drunkenness, drug abuse and peddling, safety violations and other offences."

§ 17.81 All longshoremen shall perform their work conscientiously and with sobriety and with due regard to their own interests shall not disregard the interests of the employer. Any employee who is guilty of deliberate bad conduct in connection with his work as a longshoremen or through illegal stoppage of work shall cause the delay of any vessel shall be fined suspended, or for deliberate repeated offenses for which he has been found guilty under the contract procedures, cancelled from registration. A determination that an onerous or health and safety claim

made in good faith shall be disallowed is not a finding that a man is guilty of an offense within the meaning of this section. Any employer may file with the Union a complaint against any member of the Union and the Union shall act thereon and notify the Joint Port Labor Relations Committee of its decision within 30 days from the date of receipt of the complaint. An employer shall not be required to appear nor need he participate in discipline by the Union of its members beyond the filing of complaints.

¶ 17.53 Arbitrators' decisions must be based upon the showing of facts and their application under the specific provisions of the written Agreement and be expressly confined to, and extend only to, the particular issues in dispute. The arbitrator shall have the power to pass upon any and all objections to their jurisdiction. If an arbitrator holds that a particular dispute does not arise under the Agreement, then such dispute does not arise under the agreement, then such dispute shall be subject to arbitration only by mutual consent.

¶ 17.55 All decisions of the Arbitrator, except as provided in ¶ 17.261 and 17.6 shall be final and binding upon all parties. Decisions shall be in writing signed by the arbitrator and delivered to the respective parties

¶ 17.811 If within 30 days thereafter the Employers are dissatisfied with the disciplinary action taken under Section 17.81, then the following independent procedure of Section 17.82 may be followed, which procedure shall also be applicable in the case of longshoremen not members of the Union.

¶ 17.82: " The Joint Port Labor Relations Committee has the power and duty to impose penalties on longshoremen who found guilty of stoppages of work, assault, refusal to work cargo in accordance with the provisions of this agreement, or who leave the job before relief is provided, or who are found guilty of pilfering or broaching cargo ofd of drunkenness or who in any manner violate the provisions of this agreement or

any award of decision of an arbitrator. In determining penalties neither the parties nor the arbitrators shall consider offenses that predate by 5 years or more the date of a current offense."

¶ 17.821: "Assault"

¶ 17.8211: "For the first offense assault : Minimum penalty. I year suspension. Maximum penalty , discretionary."

¶ 17.8212: "For the second offense assault : Mandatory cancellation from registered list upon the request of either party."

¶ 17.8213: "In either case such conviction shall not be dependent upon the existence of a prior court decision, nor shall the determination await a court decision."

¶ 17.822: "Pilferage."

¶ 17.8221: "For the first offense pilferage: Minimum penalty , 60 days suspension from work, Maximum penalty, discretionary."

¶ 17.8222: " For the Second offense Pilferage: Mandatory cancellation from registered list upon request from the employer."

¶ 17.823: "Drunkenness or smoking in prohibited areas."

¶ 17.8231 "First offense: Suspension for 15 days."

¶ 17.8232: "Second Offense: Suspension for 30 days."

¶ 17.8233: "Succeeding offenses: Minimum penalty, 60 days suspension. Maximum Penalty discretionary."

¶ 17.824: "Abuse of or use of controlled substances and/or drugs on the job or in or around any employment premises or the dispatch Hall."

¶ 17. 8241: "First offense: Suspension for 15 days."

¶ 17.8242: "Second Offense: Suspension for 30 days."

¶ 17.823: "Succeeding offenses: Minimum penalty, 60 days suspension. Maximum Penalty discretionary."

¶ 17.825 Sale and/or peddling of controlled substances and/or drugs on the job or in or around any employment premises or the dispatch hall.

¶ 17.8251: "For the first offense: Minimum penalty. I year

suspension. Maximum penalty, discretionary."
¶ 17.8252: "For the second offense: Mandatory cancellation from registered list upon the request of either party."
¶ 17.8213: "In either case such conviction shall not be dependent upon the existence of a prior court decision, nor shall the determination await a court decision."
¶ 17.826: An employee found to be in violation of reasonable verbal instructions, posted employer safety rules, and/or the (Pacific Coast Marine Safety Code) shall attend a 1-day safety class approved by the Coast Labor Relations Committee without pay. Failure to attend and complete the class as scheduled without a valid excuse shall result in suspension from work until the class is completed. In addition, the employee shall be subject to the following minimum discipline, which shall be applied uniformly without favoritism or discrimination.
¶ 17.8261 First offense: Letter of warning.
¶ 17.8262 Second offense: Suspension from work for 15 days."
¶ 17.8263 Third offense: Suspension from work for 60 days. Maximum penalty, discretionary "
¶ 17.8264 Fourth offense: Subject to deregistration

¶ 17.827: An employee who, knowingly and flagrantly disregards reasonable verbal instructions, posted employer safety rules, and/or the (Pacific Coast Marine Safety Code), and who intentionally causes significant damage to equipment or cargo, or who intentionally injures himself or others, shall be subject to the following minimum discipline, which shall be applied uniformly without favoritism or discrimination.
¶ 17.8271 First offense: suspension of work for ninety days. Maximum penalty, discretionary
¶ 17.8272 Second offense: Subject to deregistration.
¶ 17.828 Grievances arising under Section 17.826 and 17.827 shall be subject to the grievance procedure of Section 17, with the following exceptions.

¶ 17.8281 Grievances arising under Sections 17.826 and 17.827 shall be heard by the local parties within 30 says of the employee being cited. In the event the parties fail to resolve the grievance within the 30 -day time period, the grievance shall be referrer to the Area Arbitrator, at the request of either party, for an immediate hearing and decision.
¶ 17.84 Any longshoremen having records of habitual drunkenness or whose conduct on the job or in the dispatch hall causes disruption of normal harmony in the relationship of the parties hereto, or who physically assaults anyone in the dispatch hall or on the job, or who have records of working in a manner that is hazardous to themselves or that endangers other workers shall not be dispatched to operate or used to operate any hoisting or mechanical equipment or devices or to supervise the operation of such equipment; or they shall be subject to such other remedy as the Joint Port Labor Relations Committee shall mutually consider appropriate.
¶ 17.85: " In the event of disagreement at the Joint Port Labor Relations Committee level as to the imposition of penalties under § 17.8 the issue shall be processed immediately through the grievance procedure, and to the Area Arbitrator, if necessary

¶ 19.2: "All present fully registered employees who are not members of the Union on the date of execution or the agreement shall become and remain members in good standing as a condition of employment.